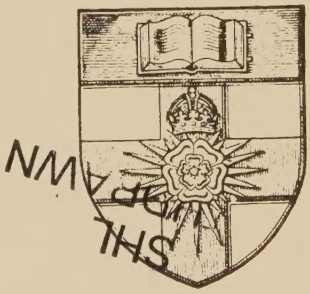
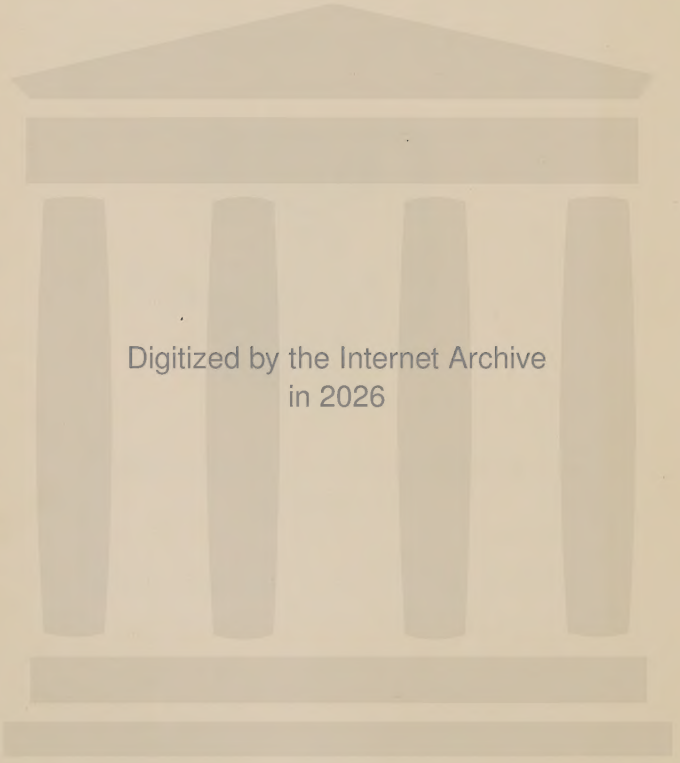
Law Periodicals
Current



UNIVERSITY OF LONDON
LIBRARY



Digitized by the Internet Archive
in 2026

https://archive.org/details/current-legal-problems_1956_9

CURRENT LEGAL PROBLEMS 1956

VOLUME 9

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Legal Publications Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

CURRENT LEGAL PROBLEMS

1956

EDITED BY

GEORGE W. KEETON

AND

GEORG SCHWARZENBERGER

On behalf of
THE FACULTY OF LAWS, UNIVERSITY COLLEGE, LONDON

VOLUME 9

LONDON
STEVENS & SONS LIMITED
1956

BIBL. LONDIN.

First published in 1956
by Stevens & Sons Limited
of 119 & 120 Chancery Lane
London — Law Publishers
and printed in Great Britain
by Bradford & Dickens
of London W.C. 1

All editorial communications should be addressed to:
The Editors,
'CURRENT LEGAL PROBLEMS,'
Faculty of Laws,
University College, London,
Gower Street, London, W.C. 1.

CONTENTS

Preface *page* vii

THE COMMON LAW, PUBLIC POLICY AND THE EXECUTIVE 1

An Address delivered before the Bentham Club by its President

THE HON. MR. JUSTICE DEVLIN

GOOD FAITH IN CONTRACTS (Inaugural Lecture) 16

PROFESSOR R. POWELL, D.C.L.

Professor of Roman Law in the University of London and Vice-Dean of the Faculty of Laws, University College, London

GIFTS IN FAVOUR OF SPORT AND RECREATION 39

O. R. MARSHALL, M.A., PH.D.

Lecturer in Laws and Sub-Dean of the Faculty of Laws, University College, London

MENS REA AND VICARIOUS RESPONSIBILITY 57

GLANVILLE WILLIAMS, M.A., LL.D.

Fellow of Jesus College, Cambridge; formerly Quain Professor of Jurisprudence in the University of London

OBSCENITY AND THE LAW 75

D. LLOYD, M.A., LL.B.

Quain Professor of Jurisprudence in the University of London

THE INTENTION OF THE LEGISLATURE IN THE INTERPRETATION OF STATUTES 96

D. J. PAYNE, LL.B.

Lecturer in Laws, University College, London

REVISION OF THE SALE OF GOODS ACT 113

E. R. H. IVAMY, PH.D.

Lecturer in Laws, University College, London

SECURITY OF TENURE UNDER THE LANDLORD AND TENANT ACT, 1954 132

E. H. SCAMELL, LL.M.

Lecturer in Laws, University College, London

THE CONTROL OF MONOPOLIES AND RESTRICTIVE TRADE PRACTICES 141

Mrs. Valentine Latham Korah, ll.m.
Lecturer in Laws, University College, London

THE CONSTITUTIONAL FUTURE OF MALTA 160

Professor R. C. FitzGerald, ll.b., f.r.s.a.
Professor of English Law in the University of London and Dean of the Faculty of Laws, University College, London

FREEDOM OF THE PRESS IN THE COMMONWEALTH 184

D. C. Holland, m.a.
Lecturer in Laws, University College, London

RECENT DEVELOPMENTS IN AIR LAW 208

B. Cheng, ph.d., Lic.-en-Dr.
Lecturer in Laws, University College, London

THE PROVINCE OF THE DOCTRINE OF INTERNATIONAL LAW 235

G. Schwarzenberger, ph.d., dr. jur.
Reader in International Law in the University of London and Director of Studies, London Institute of World Affairs

Table of Cases 266

Table of Statutes 270

Table of Treaties 272

Index 273

PREFACE

THIS is the ninth volume of *Current Legal Problems* and contains, together with an address to the Bentham Club by its President, Sir Patrick Devlin, the public lectures which were delivered during the Michaelmas and Spring Terms of the Session 1955–1956 by members of the Faculty of Laws at University College, London.

We should like to thank all concerned, contributors, publishers and printers, for their assistance in achieving the speedy publication of this volume, and also our colleague Mr. S. Prevezer, the Assistant Editor, for his work on the proofs and for compiling the Index and Tables of Cases, Statutes and Treaties.

THE EDITORS

University College, London
April, 1956

I

THE COMMON LAW, PUBLIC POLICY AND THE EXECUTIVE

PATRICK DEVLIN

COMPOSING a title for an address is sometimes just as difficult as composing the address itself. I wish that a legal composer was given the same freedom on this point as a musical composer. He can write what he likes and call it a Sonata in F Minor or a Suite for Strings and Timpani—or, if he considers himself very famous, just Devlin in G. But Dr. Webber demanded a title and I did not think that he would pass Devlin in G. So I composed one which gives at least an indication of some of the topics I want to talk about and is, I hope, wide enough to justify the excursions I have been tempted to make.

So if after these introductory trills I may now, to continue the musical metaphor, allow the bassoon to give out the first subject, it is one to which all of us nowadays are giving some measure of thought and it is this. I believe it to be generally recognised that in many of his dealings with the executive the citizen cannot get justice by process of law. I am not saying that he cannot get justice but that he cannot get it by process of law. The cause of this is, I think, clear. It is that a system of law which was designed to settle disputes between private individuals on the basis that the Government was disinterested in economic affairs, has broken down now that the government is playing the principal part in the economic life of the nation. Professor Hamson's work on the Conseil d'Etat has brought it home forcibly to English lawmakers that they cannot blame this state of affairs on developments in the twentieth century that have got beyond their control, but must accept that the English legal system has in this respect become defective. The question that an English lawyer, as distinct from a lawmaker, is thus led to ask himself is this. What prospect is there of the common law (I use this term not in distinction from equity for the fusion is for this purpose now complete, but in distinction from statute law) of

expanding to fill the void? I should say none. What then may we expect to fill the void? This paper is not chiefly concerned with answering that question though I shall return to it before I end. But I am addressing myself now to those who have to deal with the law as it is and not to those who have to plan what it should be—that is to say, to lawyers and not to legislators. Of course lawyers should have an interest in the law as it should be just as legislators ought to know something of the law as it is and as it has been. But the study of the law begins with the past and not with the future. So I want to examine first of all the trend of the common law over the past half century or thereabouts so that I may give you my reasons for thinking that the chances of any future expansion are negligible; and I want also to consider whether as common lawyers we and our immediate ancestors ought to be reproached. We are the inheritors of a great estate; is it our fault if it has no longer got the resources necessary to embark on a new enterprise?

It is often said that what Hewart, C.J., called the new despotism has encroached upon the territory of the common law and pushed back its boundaries. This is partly true; statutory enactments have in many cases prevented the courts from inquiring into matters which they would otherwise have adjudicated upon. But it is also true that the courts of common law have without any threat of invasion yielded some ground to the executive. Some of this is natural enough and serves only to show that the courts have not been as aggressive as they were in the days when the maxim *boni est ampliare jurisdictionem* was coined. Let me take an illustration of this—not one in which the subject itself is very important but one which I have selected to demonstrate the process of retreat. The courts now accept as conclusive any statement by the executive on questions of international status—such as the sovereignty of a foreign state or the extent of its territory—or on questions of diplomatic status such as gives immunity from legal process: but they have only gradually and recently reached this position. They began by saying they would not hear evidence on such matters but would take judicial notice of the facts about foreign sovereignty. Next they said that if in doubt they would apply to the appropriate Secretary of State for information. Finally, they said that the certificate of the Secretary of State was conclusive. The first case in which that was

held to be the law was, I think, *Mighell* v. *The Sultan of Johore*.[1] That case did not go farther than the Court of Appeal and the doctrine was not finally affirmed until thirty years later when *Duff* v. *Kelantan*[2] went to the House of Lords. Lord Finlay, who as Finlay, Q.C., had successfully argued the point in *Mighell's Case,* made the speech which is now generally quoted and said[3] that the court was bound to act on the information given to them through the proper department. Lord Sumner[4] preserved judicial dignity by denying that the rule was due to a mere obligation of deference to the executive; it arose, he said, from the fact that as it was the prerogative of the Crown to recognise or withhold recognition, no other evidence than its own statement was admissible or needed. Lord Finlay's dictum was the one chosen in *Engelke* v. *Musmann*.[5] In that case Scrutton, L.J.,[6] had delivered the judgment of the majority in the Court of Appeal refusing[7] 'to enlarge the class of cases coming within this rule of practice'; but the House of Lords reversed this judgment.

Let me take another illustration of the process on a more important topic. In *Liversidge* v. *Anderson*[8] the House of Lords held that 'if the Secretary of State has reasonable cause to believe' did not mean if he had in fact reasonable cause to believe, but if he thought he had. The majority of their Lordships would, I think, have agreed that the former meaning was prima facie the right one but held that the matters with which the regulation dealt were such that Parliament must have intended to commit the question of whether there was reasonable cause exclusively to the discretion of the executive. This decision left open the question whether the exercise of the discretion could be attacked if it was manifestly unreasonable or only if it was done in bad faith. In the spirit of *Liversidge* v. *Anderson* the Court of Appeal decided in *Point of Ayr Collieries* v. *Lloyd-George*[9] that it meant the latter.

[1] [1894] 1 Q.B. 149.
[2] [1924] A.C. 797.
[3] *ibid.*, at p. 813.
[4] *ibid.*, at p. 823.
[5] [1928] A.C. 433.
[6] [1928] 1 K.B. at p. 109.
[7] *ibid.*, at p. 115.
[8] [1942] A.C. 206.
[9] [1943] 2 All E.R. 546.

1942 A.C. is a good volume for the executive, for as well as *Liversidge* v. *Anderson* it contains[10] *Duncan* v. *Cammell Laird,* which decided that the question whether the disclosure of a document, or indeed the giving of oral evidence, would be injurious to the public interest and so 'privileged' is governed completely by the decision of the executive. Again perhaps in order to preserve judicial prestige, the Lord Chancellor said[11] that it is important to remember that the decision is the decision of the judge; the judge has to decide, I suppose, whether or not the correct formula for claiming privilege has been used and whether the person who is using it is really a Minister of the Crown or some impostor who has purloined the seals of office. The principle behind 'Crown privilege,' as it is called, is of course an old one and the courts had in practice generally accepted without inquiry the declaration of a responsible minister that disclosure would be injurious; but until *Duncan* v. *Cammell Laird* they had not bound themselves in all cases to do so. The decision is therefore of theoretical rather than of practical importance. But unfortunately in practice it has been regarded by government departments almost as a charter to withhold; and one suspects that the apprehension of a slight scratch is sometimes confused with fear of a real injury. The recent case of *Glasgow Corporation* v. *Central Land Board*[12] contains a powerful exhortation by Lord Radcliffe to government departments to face life a little more robustly as well as a decision of the House that the Crown in Scotland must get along without the full prerogative which the Crown in England thinks necessary for the safety of the realm.

To return to the *Point of Ayr* principle. It has never been decided whether or not the Minister's decision can be attacked on the ground that it is manifestly erroneous in law. It is clear that he can make as many errors as he likes about the facts; but suppose, for example, it could be shown that he was proceeding upon a construction of some section of an Act, which construction had been declared to be wrong by the Court of Appeal. If the principle is to be applied strictly that bad faith is the only ground upon which a ministerial decision can be attacked, then, I sup-

[10] At p. 624.
[11] At p. 642.
[12] *The Times,* December 12, 1955.

pose, the argument could at least be advanced that it is not *per se* bad faith to doubt the correctness of a decision of the Court of Appeal. Nevertheless, if the decisions of the courts can be ignored, it is putting the executive very literally above the law.

That leads to an interesting reflection. Courts of equity used the weapon of injunction to restrain the bringing of actions at common law. The courts still use it to restrain, for example, arbitration proceedings. Is there anything to prevent the courts from using the milder weapon of declaration to condemn the actions of the executive in cases in which the courts are precluded from granting relief? It might be very embarrassing to the executive if the courts in such cases took to making declarations —as, for example, that a minister had acted illegally. One can imagine our forefathers in the good old days of *boni est ampliare* laying about them vigorously. But although the power of the Court to give declaratory judgments is framed widely enough in Order 25, rule 5, in practice it has been sparingly used and never in a manner that could interfere with the discretion of the executive. In *Nixon* v. *Attorney General*[13] the plaintiff alleged that his superannuation allowance had been computed on a wrong principle; the Court held that that was a matter within the discretion of the Treasury. Clauson, J., said[14] that as the plaintiff had no legal right, the court had no power to make a declaration; it would not be proper, he said, that the courts should be invited to give some sort of advice to the Crown.

These decisions show that during the last half century the courts have been quite anxious not to tread on the executive toes. The chief of them have been taken in the stress of war and at a time when the maxim *salus populi suprema lex* may have seemed to the judges concerned more important than the liberty of the subject. But they cannot be explained simply on the ground of a temporary tenderness to the executive. For they coincide with a tendency on the part of the courts to restrict rather than to enlarge their jurisdiction in all matters in which questions of policy might arise. There was a time when the courts laid down the heads of public policy with which we are all familiar. Asquith, L.J., in *Monkland* v. *Jack Barclay Ltd.*

[13] [1930] 1 Ch. 566.
[14] *ibid.*, at p. 573.

referred.[15] to 'this charmed circle' and it is a long time since any one has succeeded in breaking into it. This does not mean that public policy is immutable: to say that would be absurd. It means that the courts will no longer make it their business to decide what public policy shall be. Moreover, one at least of the traditional heads of public policy—that which deals with restraint of trade—has not been elaborated as vigorously as it might have been, and the Monopolies Bill, shortly to be laid before Parliament, is to some extent a consequence of judicial inertia. The old principle was that restraint must be reasonable in the interests of the parties to the contract and also in the interests of the public. The latter part of this principle has grown in the United States into the anti-trust laws, but in England it has been allowed to wither away. An attempt was made towards the end of the last century to suggest that a restraint of trade might be unenforceable if it was calculated to create a pernicious monopoly: see Bowen, L.J., in the *Nordenfelt Case*[16] and in *Underwood* v. *Barker*[17] *per* Lindley, M.R. But in *Att.-Gen. of Australia* v. *Adelaide Steamship Co., Ltd.*[18] Lord Parker was able to say[19] that he was not aware of any case in which a restraint, though reasonable in the interests of the parties, had been held unenforceable because it had involved some injury to the public; and in *Connors* v. *Connors*[20] Lord Maugham thought that the creation of a pernicious monopoly would be very difficult to prove. So far as I know, it never has been proved.

I have so far been dealing with public policy in the limited sense in which the term is understood by the lawyer and have been pointing out that the courts no longer consider themselves the arbiters of policy even in this limited sense. But I should like for the purposes of this address to assign to the term 'public policy' two other meanings besides the strict one. In the first place I want to cover those notions of public policy with which the courts have approached the interpretation of statutes. For this is really another way—more subtle than the formal declarations on morality or trade—in which the courts in the past took

[15] [1951] 2 K.B. 252 at 265.
[16] [1893] 1 Ch. 630 at 688.
[17] [1899] 1 Ch. 300 at 305.
[18] [1913] A.C. 781.
[19] *ibid.*, at p. 795.
[20] [1940] 4 All E.R. 179 at 195.

a hand in framing policy. Many of the rules which have been formulated for the construction of statutes are really no more than rules of public policy. In the sixteenth century Coke made the large claim that the enactments of Parliament were subject to the essential principles of common law. But eighteenth century lawyers accepted the supremacy of Parliament and accepted—in theory at any rate—that the only business of the courts was to find out the grammatical meaning of what Parliament had said. English judges, since they are dealing with enactments made by a body that is constantly in session, have never had the task of interpreting generalities in a constitution written years ago or of searching for meanings that might be politically fruitful in the conditions of the day. Nevertheless, they have found ways of giving effect to what they believed to be fundamentally sound ideas—such as that freedom of contract should not be interfered with, that a man's property should not be taken away from him, that taxation is a rather reprehensible activity and so on—by saying that Parliament could not really have been supposed to intend to do anything so abnormal as, for example, to interfere with rights of property, unless it used clear language. They thus laid down certain rules for the strict construction of statutes which sought to do these things, and which were, as I have said, essentially based on ideas of public policy.

Acts imposing new taxes, creating new crimes and interfering with rights of contract or property were all to be strictly construed. On many of these points there was a latent conflict between the judiciary and the executive (I say 'executive' advisedly, for this type of legislation was always fathered by the government of the day) which may have had unfortunate results. The judiciary, when it disapproved of the aims of any legislation, sometimes used the principle of strict construction in a way which encouraged the search for loopholes. This has had—or rather, I should say, may have had, for it is partly speculation—two consequences.. First, it may account for some of the unwieldiness of modern statutes; they have to be drafted with an elaboration that is designed to close every possible loophole. Secondly, it may account in part for the reluctance of successive governments to entrust the High Court with any new jurisdictions and to prefer the creation of statutory tribunals as more likely to carry out their will.

It is now unlikely that the courts will create any further rules for the construction of statutes, so that there is here too a charmed circle within which this sort of public policy is now confined. Indeed, while some of the old rules are still active—for example, on the construction of penal statutes—I think that today the tendency is to approach the statute without making any general assumptions of policy.

It would be interesting—but even for this discursive paper too irrelevant an inquiry—to ask which of the two, the judiciary or the executive, was in these matters nearer to the common mind. The executive ought to be since it is the choice of the elect of the people. But then its business is to lead and therefore to formulate policy in advance of common thought. If the executive sometimes find the judges unresponsive to its new ideas, I wonder what its feeling is about juries? Some of them will stick at nothing—not even at finding bad faith against a government department—if that is the only way in which they can nullify a statutory regulation.

Then there is public policy in its very widest sense—that is the attitude of the public towards questions of the day and the reflection of that in judicial decisions. Let me illustrate the relevance of this to my present theme by taking two changes that have occurred in the last half century. The first is the attitude towards the rights of the working man. From being a person, who, having voluntarily assumed all the risks incident to his employment, was expected to look after himself, he has become a person to be planned for and protected, if necessary against himself. In this the common law has moved in conformity with and perhaps in advance of the public mood. I was going to say—with a modicum of exaggeration—that it is now almost as difficult for a workman to be careless as it is for an employer to be careful; and that as a result of the decision of the Court of Appeal in *Jones* v. *Staveley Iron Co., Ltd.*[1] one and the same act of a workman can be both careless and careful—the determining factor being whether his employer (or rather an insurance company) has to pay for it or not. But since I was going to say that, the speeches in the House of Lords in the same case have restored the balance.

The changed attitude of the English common law towards the

[1] [1955] 1 All E.R. 6.

working man was signalised by *Wilsons* v. *English*.[2] That decision would have been almost incredible in the England of fifty years before. There are, however, two things to be noted about it. The first is that the courts were in this matter behind the legislature and not in advance of it. The code of obligations created by the Factory Acts had long before abolished the old notion that the workman must take the job as he found it. The second is that the courts were stimulated by the desire to modify the unfortunate effects of an invention of their own—the doctrine of common employment. They could not do that directly because the doctrine once made could not be altered; the courts could no more get rid of it, however much they wanted to, than they could get rid of an Act of Parliament. But the doctrine of common employment did not of course settle the whole question of master and servant; it related to only one aspect of it. *Wilsons* v. *English* shows in a most instructive way how the common law can, where there is still room for manœuvre, move with the times. It cannot abrogate an existing principle of law and I doubt whether it is now ever likely to invent a completely new one. In *Wilsons* v. *English* it did not have to do either. The principle it applied is the well established one that the standard of care is not fixed but varies according to the circumstances of the case; the courts were therefore free to formulate a special standard as that which was appropriate to the relationship of master and servant.

Let me compare the action of the courts in the matter of the workman with the way in which they have faced another social change—the changed attitude towards freedom of contract. We say now of the nineteenth century thinkers that they talked of political freedom and freedom under the law and ignored economic freedom; they failed to see that it was no use leaving a man free to make what bargain he liked if he had no bargaining power. It was in the relationship of master and servant, I think, that Parliament first interfered with freedom of contract: the Truck Acts, the Employers Liability Acts and the Workmen's Compensation Acts. The bargaining power of a working man about a century ago was as low as it could be. But even men much higher in the economic scale could find themselves in a position in which it was difficult to bargain, and

[2] [1938] A.C. 57.

were faced with the take-it-or-leave-it attitude that stares you in the face from a railway ticket or a bill of lading. In this type of case the courts did their best to relieve hardship but they had to keep within the boundaries of freedom of contract. The weapon they used was the same as that which they used in the case of statutes where their hands were equally tied by the written word. They invented rules of construction. There is the rule that exceptions relieving a carrier from liability must be clear and unambiguous and there is the *contra proferentem* rule and, of course, the special rules applicable to railway tickets. Then they invented the doctrine of frustration to prevent a man being held to his contract where there is a catastrophic change of circumstances. These are brought within the basic principle because they are grounded on the presumed intention of the parties. But consistently with that basic principle (and subject to the equitable doctrine of undue influence) the courts could not relieve in cases of harshness and oppression; the basic principle of freedom of contract included freedom to oppress. Consequently, there has been a wide field for legislative activity with such statutes as the Moneylenders Acts and—in a different category—the Carriage of Goods by Sea Act and other Acts which regulate the carriage of goods by land.

Then there are cases of contract which it is considered impolitic to enforce but where the common law could hardly on any view have interfered. The interference had to be by statute, and so there are Acts which restrict the operation of the economic law of supply and demand where goods are in the modern jargon 'in short supply.' The Rent Acts and the Agricultural Holdings Act, 1948, embody what are now permanent features of our legal system. I say the courts could not have intervened here because they involve a question of policy simply—that is, the question of what is expedient to meet the needs of the day—without any tincture of morality. There is nothing immoral about a man who says that he will not let his flat in London unless he can get for it the price of a holiday in the country; there is, on the other hand, something immoral about a man who willingly consents to pay the price demanded and then seeks to go back upon his word. The justification for the legislation is that the political necessity of ensuring that 'short suppliers' do not exploit the need for their product is so great as to justify

an arbitrary law. There is nothing new about the sort of justification that accepts injustices in individual cases as the price that has to be paid for a law that is thought to be generally beneficent; it is at least as old as the Statute of Frauds. But neither the Statute of Frauds nor the Rent Acts embody the sort of political principle that could ever find favour with the common law.

Where have I got to now? To establishing, I think, the proposition that the influence of the common law has been receding and not expanding and that this is not due to any timidity in the face of advances by the executive but rather to voluntary withdrawal in the field of public policy as a whole. There are two reasons for this recession. The first is that in it the common law is obeying the law of its own nature and the second is the increase of parliamentary activity.

I know nothing of biology except that cells divide and multiply and increase in number until growth is complete: whatever force permits the growth of the organism also controls its size, and if in malignant disobedience to the limit set the cells continue to multiply, the whole will be destroyed. The common law has grown by the formation of precedents and the division and multiplication of precedents until a complete organism is formed. Thus precedent is both the life force of the common law and the factor that controls its development. Without precedent there would be no law at all; each case would be decided by the opinion of the judge and not according to rule. But precedent could not make a rule if any judge could alter it. So precedent, when finally established, becomes as rigid as the branch of a tree. There are still young shoots that can be trained this way or that but the branch itself can only be lopped or pruned. Once the tree is fully grown the area which it can shade is determined and cannot be extended.

I have spoken of precedent as if when once made binding it had to be judicially unalterable, because that is the way in which it has been treated by the common law and I cannot now stop to inquire into the large question of whether that treatment is inevitable. I doubt if it has much relevance to the wider topic on which I am now engaged. If the House of Lords did not treat itself as bound by its own decisions, it might do its own lopping and pruning (though I dare say there have been periods

in their Lordships' history in which Lord Lopper would not have been a popular figure), and perhaps even a little grafting, instead of leaving all that to the legislature. But it could not greatly alter the shape of the tree. It needs more than the discarding of an outworn precedent to form a wholly new set of principles which would be capable, for example, of keeping the activities of a modern executive under proper control.

The other limiting factor which I suggested was the increasing activity of Parliament. To a very great extent the two factors act upon each other. The full development of the common law is itself a source of parliamentary activity since it is only by legislation that the law can be amended. But it is also true that Parliament has of its own volition superseded judges as law-makers and the judges have accepted the subordination. They could not do otherwise. Indeed, the common law which gave them their powers itself of its nature demanded that they should. For the common law did not profess to make judges creators of the law and judges never claimed to do more than to expound the law which they collected from various sources, such as the doctrines of morality and religion, the rules sanctioned by custom and the rules of public policy which they believed that all reasonable men would hold. In so doing they were processing raw material; the finished product was of their fashioning and bore their stamp so that it could well be described as judge-made law. But as soon as the sovereignty of the people was recognised and the chosen delegates of the people decided to lay down in parliament their own rules for their own behaviour, the judges were bound to recognise a superior source of law. The judge is not an appointed law giver; Parliament is. The judges manufacture law; Parliament creates it. In the old days the judges had to stretch the law to meet a new situation which otherwise would have been unregulated. Now that Parliament is willing to exert itself judges are entitled, and indeed bound, to say that it is for Parliament and not for them to make new law.

I do not know how I should answer the question, if it were put to me, whether statute law or judge-made law is the more satisfactory. Judge-made law has the advantage that the judges feel their way step by step and so the law is tested empirically while it is being formed. But that has the disadvantage that all the steps are not always in the same direction and there may

be prolonged periods of uncertainty while the course is being plotted. Sometimes the process ends up in a muddle that can only be cured by the legislature; the law on liability for damage done by animals and the law on the liability of occupiers are examples of that. At its best the common law is, I think, better than any statute could be. Thus I think that the few simple and general rules laid down in *Wilsons* v. *English* are worth more than all the detailed sections of the Factories Acts and its subordinate regulations which fill so many pages of Redgrave. But then the common law rules on this subject enjoy the rare distinction of having begun their active life with a formulation by the House of Lords—that is their active life in England (like many good things they were developed in Scotland). Perhaps the best form of all is to take the common law when it is fully developed and formulate it in a statute such as the Sale of Goods Act or the Marine Insurance Act. Statutes in this class are rare. And it would be wrong to regard an Act of Parliament as, even on its own subject, a complete alternative to judge-made law. Lord Evershed in a recent address[3] has illustrated the immense amount of work that has to be done by the courts to extract from a growing body of legislation, much of which is necessarily patchwork, workable principles of law and incorporate them into the existing system.

But I must come back to the common law and the executive. I have said that the common law has not been timid in its dealings with the executive. But should it have been bolder? Could not the courts, without seeking to add to the territory ruled by the common law, have done more than they have done to curb the executive? Those who believe that the executive should be curbed at all costs will certainly answer that it could. But others will say, and I among them, that the problem was not just to offer a stubborn resistance to every increase in executive power but to bring the powers that the executive reasonably demanded under proper control. That could not be done by standing pat on existing principles but only by forming new principles. Still, people may argue if the common law had no mass of manœuvre for counter-attack and was faced with the choice of resistance or retreat, it should have held its ground.

Such people forget, I think, that the courts were dealing not

[3] (1956) 72 L.Q.R. 42.

with the ordinances of the executive but with the activities of Parliament. It is a thing that nowadays it is very easy to forget since so much of what is in form an Act of Parliament is in substance the decree of the executive. When the ordinary citizen is irked by some obligation that is put upon him, he does not care whether in form it is:

(1) the 101st section of an Act of Parliament and made so by the votes of members giving obedience to the party whips as agents of the executive and sometimes with little or no understanding of what the section meant; or
(2) a regulation made by a minister but which takes effect as if enacted by the Act; or
(3) an Order in Council; or
(4) a regulation or by-law in the old sense.

The fact is that the power of the executive over Parliament is now such that, while members can still make themselves felt on questions of principle, the detail of legislation—and it is the detail that the citizen finds most worrying—is almost entirely the work of the ministries. The ordinary man may like or dislike the substance of the work but he does not, as I have said, much mind what form it takes. But to the lawyer what matters is whether it is in form the work of Parliament. For if it is, it cannot be touched. In the long struggle with the executive which established the liberty of the subject the common law and Parliament fought side by side. They fought for the supremacy of Parliament and they won. Thus the common law has put the control of the executive into the safe keeping of Parliament. They cannot now withdraw their endowment even if they would.

The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the executive, with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control. The responsibility for that now rests with Parliament and is to be discharged, I think, in two ways. The first is by keeping a close watch on the powers that are granted to the executive and that, I believe, has the constant attention of many members of Parliament, and particularly of those lawyers on both sides of the House who continue the splendid tradition of the lawyer-legislator which has been a part of our constitutional life ever since we have had a parliament; it is a matter quite

outside the scope of this lecture. The other is by controlling the way in which the executive exercises the powers which it is given. Since that cannot be effectively done under the law as it stands, there must be created a new body of law of the sort that has come to be called administrative law.

I feel that I can hear someone saying that you did not make me President of the Bentham Society in order to preside over the liquidation of the common law. You did not, you may say, provide a magnificent banquet this evening in order to have it consumed as funeral meats. You came hoping to hear a careful diagnosis of the state of the common law, an interesting prescription and the promise of a long life; and instead you have been offered nothing but a death certificate. But such outcries would not be fair. I have not, it is true, paid all the usual tributes to Our Lady the Common Law. I have ventured instead to say that she is not as young as she once was and that she cannot any longer indulge in activities which in her youth she would have taken in her stride. Perhaps the time has come for her to hand over a part of her former responsibilities. But it would be typical of the English way of life if there was no formal deed of transfer. We all know how equity was created, how it performed many of the tasks which the common law would not stretch out to do and how the two systems came together and gave new life to the law of England. Perhaps the time is coming near when there will be a new creation and a new transfusion. It does not matter after all where the law comes from; whether from equity or from the old common law or from some source as yet untapped; whether it is made by Parliament or by judges or even by ministers; what matters is the law of England.

2

GOOD FAITH IN CONTRACTS[1]

RAPHAEL POWELL

PROLOGUE

THERE are four gambits to open any inaugural lecture. Firstly you point out that as a general rule a Professor is not legally bound to give such a lecture, but that the social constraint is overpowering. The story is told[2] that about a hundred years ago the proprietor of an oyster saloon in Drury Lane found that one of his oysters had a small hole pierced in its upper shell, with the result that when water was forced through this hole, as the mollusc breathed, a shrill whistling sound was emitted. The proprietor segregated it at once, and it is related that 'Dickens and Thackeray were amongst the celebrities that came to view the musical mollusc and to feast prodigiously on its less distinguished relatives.' I feel as that oyster must have felt. The second gambit is to say that you realise that the audience is somewhat mixed and that you are not sure at what level you should talk. In fact, you have roughly divided the audience into the knowledgeable and the relatively ignorant. And you think you will probably hit the right level if the knowledgeable go away thinking that you are relatively ignorant, and the relatively ignorant go away believing that you are knowledgeable. Thirdly, the new Professor pays his tribute to past holders of the Chair, realising his own inadequacy by comparison with them but hoping that both his listeners and the shades of his predecessors will not have drawn the same conclusion. There have been four previous Professors of Roman Law in this College—Hunter, Robertson, Murison and Jolowicz.[3] Merely to mention their names is sufficient. For the

[1] This lecture in the series of Current Legal Problems was also Professor Powell's Inaugural Lecture as Professor of Roman Law in the University of London.

[2] By E. G. Boulenger. See Louis Golding and André L. Simon, *We Shall Eat and Drink Again*, p. 30.

[3] W. A. Hunter, 1869–70 to 1878–9; E. Robertson, 1878–9 to 1883–4; A. F. Murison, 1883–4 to 1924–5; H. F. Jolowicz, 1931–2 to 1948–9.

most part they taught students who were reasonably well versed in the Latin tongue and often with some knowledge of ancient history. But in recent years the schools have been teaching less of these subjects to fewer pupils, and many who come to the University know more of electrons than they do of Electra. My late-lamented former teacher Professor Jolowicz had already deemed it advisable to abandon the teaching of first-year students through the text of the Institutes. I have thought fit to introduce into the teaching of Roman law more and more of the comparative method which I believe to be essential to the training of a lawyer. The fourth gambit is to mention that the word 'inaugural' has something to do with augury and omens. No soothsayer warned me against giving this lecture on the thirteenth of the month.[4] But there may be some significance in the fact that my appointment to the Chair of Roman Law dates from the first of April. Certainly only foolhardiness or presumptuousness would permit a lawyer to trespass into the field of morals which is suggested by the title of this lecture.

Like Mr. Wilfred Pickles,[5] I believe in the fundamental decency of the common man. The common man has had to be decent. The experience of generations has taught him that, if he is not decent to others, others will not be decent to him. And it has taught him that, in the long run, if he does good he will feel good, but that if he does evil he will feel badly. It may be supposed, therefore, that if he gave his word to another man not only would he fulfil his promise but the other man would confidently expect him to do so. But for many reasons into which we cannot enter here that represents a comparatively advanced stage of development.[6] The questions involved can be stated very simply. (1) Could a man safely rely on the promise of another? (2) If that promise was not carried out, did he have any remedy? Unfortunately, the common man has also learned by experience that some men do not keep their word. The resulting distrust is abundantly evidenced in every age and generation. The child who doubts your word demands that you use the word 'promise.' In much the same way, perhaps, the Romans insisted on the Latin *spondeo*. And you will remember that Odysseus would not

[4] The lecture was given on October 13, 1955.
[5] See *Radio Times*, September 16, 1955.
[6] See A. S. Diamond, *Primitive Law* (2nd ed. 1950), p. 392 *et seq.*

go to bed with Circe until she had given her word *with due solemnity* that she had no further mischievous designs upon him —but then Circe was neither common nor a man.[7] Sometimes the promisee insists on the addition of an oath or some kind of magic words, such as 'cross my heart': in my part of the country we added the word 'Jonnock' as a guarantee of our honesty. Sometimes a solemn act accompanies the undertaking, especially the drink-offering to the gods and the pouring-out upon the earth of the red wine, symbolising no doubt the blood which might flow if the promise were not fulfilled. Often the promise was supported by the guarantee of other persons, especially the promisor's kinsmen, or by some kind of material pledge. And to this day the bank which accommodates you with an overdraft or the building society which lends you money to buy a house is reluctant to accept only your personal word that you will repay the money.

Promises supported in ways like these were more to be trusted than a man's plain word. In many cases they were also easier to prove if there was a dispute. As a result the law eventually gave its aid to the enforcement of certain kinds of promises clothed with some specified form or other, although very often the form might be comparatively simple. It would be hard to believe, however, that even in the early history of a society all promises are accompanied by formality. Even though trading transactions may have been few in number and limited in scope many of them must have been effected by simple formless undertakings. Most ordinary everyday transactions are brought about by formless agreements to do something in the future. In spite of, or perhaps because of, their frequency and simplicity the words used by the parties to these agreements do not always state expressly all the obligations that each one expects from the other. Many of these obligations are left to be determined by the usual practice of ordinary men dealing with each other in similar transactions. Thus if I buy a pipe from a tobacconist it is unlikely that he will expressly assure me that he has a right to sell the pipe, or that the pipe is of merchantable quality or that he will deliver the pipe to me in a reasonable time. All these assurances are tacitly understood to be part of the bargain between the parties.

[7] Homer, *Odyssey* X.

THE ROMAN NOTION OF BONA FIDES

Suppose then that you wanted to bring an action in early Rome for breach of an agreement. The old Roman forms of civil action (*legis actiones*) could only be used where the plaintiff was able to assert something definite and express, for example that he owned the property in issue or that the defendant owed him a sum of money. The complex of rights and duties involved in everyday dealings such as, for example, sale, letting and hiring, or partnership—and especially those rights and duties which were not express but implied—could not be satisfactorily dealt with by these actions. Nor was that all. The parties to these old actions had to define the issue between them in a precise form of words, in Latin, and sometimes with oaths invoking the Roman gods. That was all very well for Roman citizens who spoke Latin and who worshipped the Roman gods. But it meant a complete denial of justice to the foreigner whose Latin was non-existent or imperfect and upon whom the Roman religion was not binding. Even as early as the third century B.C. it was obvious that the expansion of Roman dominion was bound, sooner or later, to result in an increase of trade. The courts therefore had to provide adequate remedies for breach of the ordinary everyday kinds of agreement. Moreover, these remedies had to be capable of being used by both citizen and foreigner alike.

Sohm tells us that good faith as between man and man was the natural foundation on which these informal transactions rested.[8] Gernet calls it respect for the rules of the game.[9] In a recent article[10] Pringsheim refers to an opinion that even in the black market fixed rules and usages were formed and respected everywhere. He suggests the possible existence of a similar code of illicit trading among thieves and receivers of stolen goods. In all these cases a body of rules may grow up among traders as a result of common practice and be respected without recourse to the courts.[11] That is as true of rogues as it is of traders in a market-

[8] R. Sohm, *Institutes of Roman Law* (3rd ed. tr. J. C. Ledlie), p. 65.
[9] L. Gernet, '*Sur l'obligation contractuelle dans la vente hellénique*' (1953), 2 *Archives d'Histoire du Droit Oriental, Revue Internationale des Droits de l'Antiquité*, p. 229 *et seq.*, at p. 246.
[10] F. Pringsheim, '*L'origine des contrats consensuels*' (1954) 32 *Revue Historique de Droit Français et étranger*, p. 475.
[11] *ibid.*, at p. 487.

place, within a state, or in the wider fields of international commerce. Call it good faith if you like. That at any rate is what the Romans called it.

So far, however, this good faith is simply a social force. It was to the merit of the Roman legal genius that it converted bona fides into a basis for legal action. That became possible through a more flexible method of defining the issue between the parties. The praetor, a Roman magistrate, addressed a formula to the judge, instructing him to condemn the defendant to perform for the plaintiff whatever he ought to perform *ex fide bona*—in accordance with good faith. These words, *ex fide bona,* are capable of several constructions: (1) They might show that the obligation of the defendant, and therefore the right of the plaintiff, existed only by virtue of good faith. Their sole purpose originally was probably simply to give a Roman court jurisdiction over a case which otherwise would be outside its province because the plaintiff had no right under the Roman civil law.[12] (2) They define in a short phrase the whole complex of rights and duties between the parties in the particular transaction. In order to pinpoint those rights and duties more clearly, the particular transaction was briefly recited in an earlier part of the formula—the *demonstratio.* Upon this structure of bona fides the Roman jurists elaborated a number of legal rules defining the obligations in the majority of normal commercial transactions. Some of these rules were common to all or most of the transactions—or rather to the actions which could be brought in respect of them.[13] In addition the texts show that there were specific applications of the broad principle of bona fides to particular cases.[14] There is very little in the texts to suggest that the Roman lawyers were avowedly concerned with ethical principles in their treatment of good faith. No doubt it would be possible to discover a moral foundation for a number of the rules; but that is equally true of most rules of law in any system. There is evidence that the jurists were concerned to ensure that parties

[12] See F. Schulz, *Classical Roman Law* (1951), p. 36; M. Horvat, *'Osservazioni sulla "bona fides" nel diritto romano obbligatario'* (1953) 1 *Studi in onore di Arangio-Ruiz,* p. 423.

[13] See W. W. Buckland, *A Text-Book of Roman Law* (2nd ed. 1932), p. 678 *et seq.*

[14] For examples, see *D.* 17, 1, 10 pr. 3; 22, 4. 5; 27, 4; 56, 2. 4; 59, 1; 60, 4: *D.* 17, 2, 76–80: *D.* 18, 1, 57, 3; 68 pr.: *D.* 19, 1, 1, 1; 6, 9; 11, 18; 48; 50: *D.* 19, 2, 24 pr.; 45, 1: *D.* 30, 84, 5.

to a contract should observe the usual customary rules which applied to each transaction.[15] But in most cases the text simply bases the rule stated on good faith and we are left to find out for ourselves the degree of its ethical content.[16]

THE CANON LAW

In the Middle Ages, however, the Canon lawyers had no doubt whatever of the moral foundation of bona fides. Indeed they began by assuming that every promise was binding on the conscience of the person who made it and that failure or refusal to keep it was a breach of that person's duty to God.[17] Dr. Helmut Coing has recently described how, from the twelfth century, this duty was enforced in the ecclesiastical courts by the *denunciatio evangelica*.[18] The final judgment in that procedure decreed that the defendant should 'go out of his sin' and was enforced by excommunication.[19] Later the Canonists found that this indiscriminate enforcement of all promises, whatever their character, was not always practicable. The medieval civilians had found in the Roman texts a rule that no action will lie on a naked agreement. Let me take up the story in the words of Mr. Fifoot[20]: 'Canonists sought a reconciliation by developing a doctrine of *causa* which might serve, even if no more opaque than the emperor's robes in the fable, to clothe the naked pact. They therefore declared that a pact was valid if it were adorned by an adequate *causa*. The definition of *causa* was a more embarrassing task and encouraged ingenious speculation, but, by the general consensus of opinion, the doctrine required the plaintiff to prove only that the promise had been made with a serious purpose. Unless his design was manifestly unreasonable or improper, the promisor was bound. Nor need his aim be

[15] *e.g.*, *D.* 17, 1, 10, 3; 21, 1, 31, 20.

[16] Pringsheim, *loc. cit.*, at p. 476, holds the view that the idea of a legally enforceable contract arising simply from the agreement of the parties is Roman in origin, though the general notion of bona fides may be traced to Greek influence. See, also, F. Pringsheim, *The Greek Law of Sale* (1950), at p. 87.

[17] C. H. S. Fifoot, *History and Sources of the Common Law* (1949), at p. 306. A similar principle is to be found in Jewish law. See Rabbi Isaac Herzog, 'Moral Rights and Duties in Jewish Law' (1929) 41 *Juridical Review*, p. 60 *et seq.*

[18] H. Coing, 'English Equity and the *Denunciatio Evangelica* of the Canon Law' (1955) 74 *Law Quarterly Review*, p. 223.

[19] *ibid.*, at p. 229.

[20] Fifoot, *op. cit.*, at p. 306.

commercial: benevolence, piety or the discharge of a moral obligation sufficed.'

ENGLISH LAW

In England the first Chancellors were ecclesiastics, versed in the Canon law. The basic principles applied by them in the Court of Chancery were much the same as those used by the Canon lawyers in the Ecclesiastical Courts. In the Middle Ages the jurisdiction of the Common Law Courts over contracts was very limited and there was no general remedy for the breach of a simple contract. The Ecclesiastical Courts were willing to use their procedure to enforce such contracts. The Common Law Courts adopted a dog-in-the-manger attitude and repeatedly issued writs of prohibition to prevent recourse to the courts of the Church. Even as early as the thirteenth century, however, it was clear that the development of trade, and particularly of foreign trade, required the provision of a general remedy for breach of contract. In each succeeding century the tempo of that need accelerated until eventually in the sixteenth century the Common Law Courts were driven to devise a remedy through the action of *assumpsit*. But what happened in the intervening years?

Several statutes provided summary remedies in local courts. But these were inadequate, and many addressed petitions to the King, praying that their adversaries might be compelled to perform their contracts. Of course the words used by them vary a good deal; but with ever-increasing monotony the plea is that the debtor has acted 'against good faith and conscience' or the petitioner prays that the debtor shall be compelled to do 'what good faith and conscience require.' Today, if you produce a will with a normal attestation clause, you will usually get probate of the will in common form without going to court. In the fifteenth century, in a similar way, the use of the words 'good faith and conscience' was probably necessary, not only to catch the eye of the Chancellor but also to put in his hands the key with which he could without qualms open his court to the petitioner. When the Chancellor dealt with the petition, he in turn emphasised the duties of good faith and conscience—especially conscience.[1]

It would be pleasant to record that, when the Common Law

[1] Cf. the use of *ex fide bona* in the Roman *formula,* p. 20, *ante.*

Courts eventually developed the action of *assumpsit* into a general remedy for breach of contract, they did so because they too were concerned with good faith and conscience. But I doubt whether this would be historically accurate, for the following reasons :

(1) The common lawyers were concerned with the possible loss of business and fees, particularly in an age of commercial prosperity.

(2) They were already aligning themselves on the side of Parliament against the more autocratic claims of the Crown. They were therefore astute to guard against the rising power of the Court of Chancery, which represented to them part of the Crown's authority.

(3) It was a matter of professional pride that they had hitherto been insufficiently ingenious to devise a remedy so greatly in demand.

The remedy was found eventually by starting with misfeasances of undertakings and then, with more or less logic, working through to the idea that even failure to perform a promise was actionable. It was an abnormally laborious process and the ultimate result seems to have been produced by something like a Cæsarean operation. But the Common Law Courts did not use the defendant's absence of good faith as the reason for the plaintiff's cause of action.[2] If they had been able to resort to so conveniently useful a midwife the period of gestation might perhaps have been miraculously shortened.

But, you will say, surely the English law of contract abounds with illustrations of the rule of good faith. I would prefer to say that there are a number of individual cases in which the law contains an element of objective or subjective good faith. By objective good faith I mean the standards of the ordinary man; subjective good faith means individual honesty and necessarily

[2] Perhaps a different story could be told about the later development of *indebitatus assumpsit*. The law in a number of cases implied a promise by the defendant to pay or repay money to the plaintiff. The circumstances often had nothing to do with a contract at all, but a contractual remedy was used to make the defendant pay where he had secured an unfair advantage at the plaintiff's expense. On one view he is obliged to pay 'by the ties of natural justice and equity.' See *Moses* v. *Macferlan* (1760) 2 Burr. 1005. But even if the obligation is said to be based on an implied promise to pay, does not that mean that a promise is implied when an ordinary man of good faith would expect or be expected to pay?

involves the absence of bad faith. Sometimes even objective good faith contains a faint suggestion of the need for individual honesty. Let us look at some of the rules.

(1) In the interpretation of the express words of a contract we use the standards of the ordinary man as a general rule.

(2) We use the same standards to fill gaps in the express terms, implying such terms as the ordinary man would have inserted if he had thought about the matter.

(3) There are remedies for misrepresentation, mistake, duress and undue influence.

(4) As a result of the doctrine of part performance a plaintiff can ask the court for specific performance of his contract even when he can produce only oral evidence of a contract which a statute requires to be evidenced by writing. The gist of the plaintiff's case is that, on the faith of the defendant's promise, he has done something which could only with expense or difficulty be undone.

(5) As a general rule you cannot enforce a promise unless it is under seal or you have given some consideration for it. But an equitable doctrine has grown up to the effect that I cannot go back on a promise which was intended to be binding, intended to be acted upon, and had in fact been acted upon. You still cannot enforce such a promise unless it is under seal or is supported by consideration. But if I bring an action against you, you can rely on my promise as a defence to the action. Thus, in the *Hightrees Case*,[3] the defendants took a lease of a block of flats in London at a ground rent of £2,500 a year. As a result of the war many flats became vacant. The plaintiff lessors of the block agreed, quite gratuitously, to reduce the rent by half. When the war ended the flats filled up again. The lessors succeeded in a claim for the balance of the rent for two quarters thereafter. But Denning, J., as he then was, stated the equitable doctrine mentioned above, which would have prevented the lessors claiming the balance of rent for the war years.

(6) If you bring an action for specific performance the court has a discretion and can refuse your remedy if your own conduct has been inequitable or, in certain cases, if you are not yourself prepared to do what is equitable.

(7) Where discretionary powers are given by a contract it is

[3] [1947] K.B. 130.

moderately certain law that these powers must be exercised in good faith. I say 'moderately certain' because in some cases the law is certain, in other cases it rests mainly on *obiter dicta,* while in yet other cases it is not altogether clear that the duty to use good faith depends on contract at all.[4]

(8) In certain contracts, one party alone knows fully all the material facts which would affect the other party's decision whether or on what conditions to enter into the contract. The chief example is the contract of insurance.[5] The insurer wants to know a number of facts about you or your property before he will insure either. He has many sources of information open to him and can get his own experts to examine the property or the body to be insured. But there are still a number of facts which only you are likely to know. Both the law and the insurer therefore impose a duty on you to disclose fully all material facts. Contracts of this character are called *uberrimae fidei, i.e.,* of the utmost good faith.

(9) In some contracts the duty of good faith arises after the contract has been made, by reason of the fiduciary position of one or both of the parties. That is so in partnership, suretyship and the relation between principal and agent.

Nevertheless, in spite of these examples of what can be called principles of good faith, it is submitted that in English law there is no overriding general positive duty of good faith imposed on the parties to a contract.[6] Here are some of my reasons for saying this: (1) The existence of a class of contracts called *uberrimae fidei* suggests that all other contracts should require ordinary good faith. But the use of the superlative is really only

[4] See Dennis Lloyd, 'Disciplinary Powers of Professional Bodies' (1950) 13 *Modern Law Review,* p. 281; 'Judicial Review of Expulsion by a Domestic Tribunal' (1952) 15 *Modern Law Review,* p. 413. In *Hudson* v. *Buck* (1877) 7 Ch.D. 683 and *Caney* v. *Leith* [1937] 2 All E.R. 532, there are *obiter dicta* to the effect that a condition for solicitor's approval is deemed to be fulfilled if the solicitor does not act in good faith. The same reasoning has been applied more directly in cases where an architect or engineer has to give a certificate in relation to building work. See *Hickman & Co.* v. *Roberts* [1913] A.C. 229.

[5] For other cases, see Cheshire and Fifoot, *Law of Contract* (4th ed. 1956), pp. 229–233; Pollock, *Principles of Contract* (13th ed. 1950), p. 429 *et seq.*

[6] A simple statutory provision could create such a duty. See, *e.g.,* the provision in German law, *post,* p. 31. The present equitable jurisdiction of the courts is probably inadequate for the purpose. See The Rt. Hon. Sir Alfred Denning, 'The Need for a New Equity' (1952) 5 *Current Legal Problems,* p. 1 *et seq.*

a form of hyperbole. It could equally well have been said that a person who proposes insurance must act in good faith and disclose all material facts. If, however, there had been an overriding duty of good faith in all contracts, there would then have been no need to regard this class of contracts as extraordinary in any sense.

(2) For want of a rule of good faith the courts have upon occasions had to resort to contortions or subterfuges in order to give effect to their sense of the justice of the case. In actions for restitution they have often resorted to fictitious implied promises. In decisions on the *Hightrees Case* pattern the password has been called quasi-estoppel. This year we have had another example in *Ingham* v. *Emes*.[7] The plaintiff knew that she was allergic to a form of hair-dyeing process called Inecto. Yet she allowed a hairdresser to treat her hair by Inecto and as a result contracted dermatitis. A contract for treatment by the Inecto process is not one of the contracts *uberrimae fidei*. If there had been a general rule requiring good faith the plaintiff would surely have failed simply on the ground that her non-disclosure of her allergy was a breach of that rule. But instead the court had to twist and turn in order to find a good reason why she should fail in her action. She was claiming that the hairdresser impliedly warranted that the process was fit for her purpose. So she had to show that she had made that purpose known to the hairdresser. But what was the purpose? Denning, L.J., said that it was to dye the hair, not of a normal person, but of a person known to be allergic to Inecto. That purpose she did not disclose and therefore she could not recover.

(3) Sometimes even the contortions of a Laocoon cannot extricate the judge from the inequitable coils which the law has wound around him for want of a general requirement of good faith. In a case in 1934,[8] Miss L'Estrange bought an automatic slot cigarette machine for her café. The machine did not work satisfactorily and soon jammed and became unworkable. Miss L'Estrange claimed damages on the ground of an implied warranty by the suppliers that the machine should be fit for the purpose for which it was sold. However, when she bought the machine she had signed, but never read, a form called a Sales

[7] [1955] 2 All E.R. 740.
[8] *L'Estrange* v. *F. Graucob, Ltd.* [1934] 2 K.B. 395.

Agreement. It was printed on brown paper, and in small print there was a clause providing that, *inter alia,* all implied conditions and warranties were excluded. The Court of Appeal held that she was bound by the terms of the contract she had signed. You may not be surprised to find these words in the judgment of Maugham, L.J., as he then was, 'I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations.'[9] Nowadays many contracts are made by signing the blanks in a printed form containing conditions which have been drawn up by the other contracting party. The French call them contracts of adhesion—perhaps they mean that once you sign such a contract you are stuck with it! Of course the law protects you against misrepresentation. But perhaps something more is needed. It may be that a rule requiring good faith would compel the party who produces the printed form to call your attention to the pitfalls before you sign the form. In French law there is such a rule,[10] and in a few rare cases an attempt has been made to use it to prevent abuses.[11] More frequently, however, the French courts have had to rely on other provisions of the code,[12] and the legislature has had to enact new laws to deal with non-disclosure in specific cases.[13] In English law we have at any rate two possibilities at present, and they are not necessarily mutually exclusive. (1) We can say with Dr. Goodhart that 'it is the legal expression of the moral law that a man must fulfil his promise, however hard this may be on him.'[14] (2) We can, with Lord Justice Denning—indeed with all members of the Judiciary—be eternally vigilant in the interests of the common man, and even stretch the law as far as possible to protect him. In a case in 1951,[15] Mrs. Curtis took her white satin evening dress to the cleaners. A shop assistant gave her a paper, headed with the word 'Receipt,' to sign. Mrs. Curtis had the good sense to ask the assistant why her signature was needed. The girl told her that it was because the cleaners would not accept liability for certain risks, including risk of damage by or to the beads and sequins with which this dress was trimmed.

[9] *ibid.,* at p. 405.
[10] *Code civil,* Art. 1134.
[11] *e.g.,* D. 1906, 1, 359; S. 1929, 2, 134; S. 1931, 1, 14.
[12] *e.g., Code civil,* Arts. 6, 1137.
[13] See R. Vouin, *La Bonne Foi* (1939), pp. 127–129.
[14] A. L. Goodhart, *English Law and the Moral Law* (1953), p. 105.
[15] *Curtis* v. *Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805.

Mrs. Curtis signed the form, apparently without reading it. Her dress was returned to her with a stain on it, and she sued the cleaners for damages. She then found that the so-called receipt contained a condition excluding the cleaners' liability for any damage whatsoever, not merely the kinds of damage stated by the shop assistant. So the shop assistant had made a false statement, though innocently. This misrepresentation prevented the cleaners relying on the condition in the receipt. Denning, L.J., pointed out that there can be misrepresentation even where a false impression is created which misleads the customer about the existence or extent of the exemption from liability. He further suggested that, if Mrs. Curtis had not known that the document contained an exemption clause and if the assistant had said nothing at all about its contents, the fact that it was headed with the word 'Receipt' could have amounted to a misrepresentation by the cleaners.

But even if the law gives a remedy for innocent or fraudulent misrepresentation, that does not necessarily mean that it imposes a general duty of good faith. It merely means that it sets a boundary beyond which a person's conduct leads to a legal consequence in court proceedings. There is still an area in which a man's conduct, though lacking in good faith, does not involve legal consequences in English law.

SCOTS LAW

One might think that the Scots law of contract, a little more closely related to the Roman law than English law, would be more likely to be pervaded by the rule of good faith. One of the main textbooks on the subject—Gloag on *Contract*[16]—even contains the statement that 'it is a general rule that contracts are to be construed on the assumption of honest dealing.'[17] That broad statement, however, simply introduces a more specific rule that no general exemption clause in a contract, however widely expressed, will enable a party to escape the normal consequences of his own fraud. And, in that part of the book, that is all that is written on the important general rule. But about a hundred pages earlier[18] the author treats of the 'implied limita-

[16] W. M. Gloag, *The Law of Contract* (2nd ed. 1929).
[17] *ibid.*, at p. 400.
[18] *ibid.*, p. 302 *et seq.*

tions of discretionary powers'—a title which appears in the Index under the heading 'good faith.' The matters dealt with are, in the main, very like the examples of discretionary powers in English law, and many of the cases cited are English cases. Here, however, there is no assertion of a general rule of good faith. Instead, the author uses these words[19]: 'Where one party to a contract is vested with a discretionary power, in terms apparently unqualified, it would seem to be a question to which no general answer can be given whether the power will be construed according to the literal meaning of the words, or qualified by the implication that the party vested with it must regard himself as bound to decide in a quasi-judicial or fiduciary capacity.' We have seen that that is probably equally true of English law.[20]

FRENCH LAW AND GERMAN LAW

Comparisons are onerous. You have no sooner started to compare one system with another than you are led on to a third and then a fourth and so on until you reach systems of law of which you can discover less and less. It is like standing in a room between two large mirrors, in which you see the same scene diminishing in size in proportion to the increase in the number of reflected images. Like Alice in Wonderland you eventually come to the point where you seem to be looking through the wrong end of the telescope; and with her you murmur to yourself, 'Curiouser and curiouser.'

It was to be expected that many foreign codes of law, founded in greater or lesser degree upon the Roman law, would borrow the rule of good faith in one form or another. As far as my search has taken me at present, I have reached two conclusions:

(1) Quite often the foreign court, using the medium of a rule requiring good faith, arrives at the same conclusion as an English court which has used another rule or a more roundabout road.[1]

(2) In a number of cases a rule requiring good faith has enabled the foreign court to adjust the relations between the parties more equitably than an English court in similar circumstances.

[19] *ibid.*, at p. 302.
[20] See pp. 24–25, *ante*.
[1] In French law, see *e.g.*, D. 63, 1, 302; S. 1933, 1, 330 (agent's duty not to profit personally by information obtained in executing his mandate).

Article 1134 of the French Code Civil provides that contracts must be performed in good faith. The code did not define good faith or the standards by which it was to be judged. The learned editor of Planiol et Ripert says that it had a broader meaning than it had in Roman law: it means that every contracting party must act as an honest man in everything relating to the execution of the contract.[2] But that begs the question, what does honesty mean in this connection? There are other provisions in the code to guard against fraud; and equally there are a number of provisions which reward or protect a person acting in good faith in certain circumstances.[3] But these provisions are concerned with subjective good faith, or the absence of it, in the individual contracting party. They are already concerned with individual honesty, so that either article 1134 must mean a reserve of honesty to cover cases not specifically provided for, or it must mean something different from honesty. Some writers find it in the common intention of the parties. Others attach it to some other standard, such as *l'ordre public, les bonnes mœurs,* or just simply equity.[4] Still others conceive of it as an altogether independent notion. The textbook of Planiol et Ripert leans at first towards the idea that article 1134 provides for a reserve obligation of honest conduct where the duties of the parties are not laid down by their contract or by the law.[5] Here are two cases which they cite to explain its application:

(1) An importer sells a quantity of goods. A clause in the contract provides for 10 per cent variation from the quantity because the importer wants to avoid liability for possible loss during importation or carriage. But he cannot use the clause to increase or cut down by 10 per cent the quantity he will deliver, according to whether there has been a rise or fall in the current price of the goods. That would be contrary to good faith.[6]

(2) A warehousekeeper lets storage space. A clause in his contract with each depositor relieves him from liability for theft.

[2] Planiol et Ripert, *Traité Pratique de Droit Civil Français* (2nd ed. 1952), Vol. 6, p. 508.
[3] *e.g., Code Civil,* Arts. 1147, 1150, 1153, 1244. See Vouin, *op. cit.*, p. 145 *et seq.*
[4] Vouin, *op. cit,* p. 92 *et seq.*
[5] Planiol et Ripert, *op. cit.*, p. 509.
[6] S. 1929, 1, 151. Cf. S. 1932, 1, 102.

It is against good faith for him to rely on this clause if he forbids the depositors to guard their goods by night.[7]

It is then admitted that these decisions can be attributed to usages or to the interpretation of the contract.[8] Nevertheless it is insisted that in these decisions there is a moral judgment of the conduct of a party. The name for that moral judgment is good faith.[9] But does that carry us any further? We can concede that there is a moral judgment whenever a question of individual good faith arises; but we must still get down to the brass tacks of finding the standards by which that judgment is to be reached. And if we are concerned with objective contractual good faith the element of moral judgment is in any case less material, if it is material at all, than the common practice in similar circumstances. However, it has to be admitted that, in French law in particular, the view that article 1134 provides for a reserve obligation of honesty has produced a considerable expansion of the conception of fraud. It is often said that as a general rule non-disclosure of a fact does not amount to any kind of fraud unless there is a legal duty to disclose the fact. In French law there has been a wide extension of the idea of fraud by silence, by resorting to the obligation of good faith.[10]

Nevertheless I have the impression that Article 1134 has not been adequately developed,[11] indeed that it has little independent force of its own but is merely ancillary to the interpretation of other provisions of the code. We get a different impression from German law. Section 157 of the German code[12] provides that contracts must be interpreted in accordance with good faith, having regard to common usage.[13] But the more important section is section 242. This provides that the debtor is bound to perform the contract in accordance with good faith, having regard to common usage.[13] Although a party to an action may rely on this provision there is no need to plead it specially.

[7] S. 1930, 1, 6. For another case, see S. 1931, 1, 14.
[8] Planiol et Ripert, *op. cit.*, p. 509; and see, also, p. 242—'*Les tribunaux s'inspirent des usages et des règles de la morale courante.*'
[9] *ibid.*, pp. 509–510.
[10] See Planiol et Ripert, *op. cit.*, p. 241 *et seq.*; G. Ripert, *La Règle Morale dans les Obligations Civiles* (4th ed. 1949), p. 89 *et seq.*; Michel de Juglart, '*L'obligation de Renseignements dans les Contrats*' (1945) 43 *Revue Trimestrielle de Droit Civil*, p. 1 *et seq.*
[11] Cf. Vouin, *op. cit.*, p. 144.
[12] *Bürgerliches Gesetzbuch* (*BGB*).
[13] *Die Verkehrssitte.*

German law has adopted the Roman law rule that it is part of the judge's function to determine whether performance has been in accordance with good faith. Section 242 has been used very widely. Primarily it defines the way in which the debtor must perform his duties. But it is used also to some extent to prevent the exercise of rights beyond the limits of good faith. Still more widely, it is used as an equity reserve, enabling the courts to meet changing conditions, even to the extent of adjusting statute law to new situations.[14] Let us look at some examples of its application:

(1) It is used to imply terms in a contract.

(2) The parties to a contract acquire what can be called principal rights and duties under that contract; but by virtue of section 242 they also acquire such accessory rights and duties as good faith requires. Thus at the end of a tenancy the landlord must forward his tenant's mail and allow the tenant to put a poster with his new address on the leased premises.[15]

(3) There is a rather long general period for limitation of actions in German law. The section has been used to defeat claims on the ground of lapse of time even though the statutory limitation period has not yet expired. You are not in good faith if, like a cat, you wait so long that the other party believes that you will not attack him in an action on the contract.[16] This bears some resemblance to the English doctrine of laches. But section 242 has also worked the other way. You sue me on a contract. I plead that your claim is barred because the limitation period has expired. You then say that as a result of my conduct you had been led to believe that I would not dispute your claim. So you felt that there was no hurry. Indeed you may even have been induced to give me a long time to pay because you thought that my business was not doing very well. Now you sue me and I have the effrontery to plead that your claim is statute-barred. German courts have held that if my conduct, whether intentional or even negligent, led to your belief, it is contrary to good faith that I should rely on the expiration of the limitation period.[17]

[14] See E. J. Cohn, *Manual of German Law* (1950), Vol. 1, p. 60. This book contains a valuable introduction to the subject at p. 59 *et seq.* I have borrowed extensively from it in this paper.

[15] RGZ 161, 338.

[16] This is the doctrine of *Verwirkung*.

[17] RGZ 87, 283; 144, 385. The English law relating to written acknowledgment of the debt, and express or implied promises to pay statute-

(4) A party to an invalid contract cannot keep an advantage he has obtained under the contract and also claim to be released from his obligations because the contract is invalid.[18] In a case in 1909,[19] A bought a house from B for three times its real value, together with the business of a brothel carried on in the house. Later A claimed a reduction in the price on the ground that the house had dry rot and that B had not disclosed this fact. There was an unpaid balance of the price secured by a mortgage on the house. A claimed that he need not pay this because the contract was illegal and therefore the mortgage also was void. The court would not grant this remedy. It was against good faith for A to keep the advantages he had obtained under the contract and yet have the contract declared illegal. An interesting attempt to use this doctrine was made in a recent English case—*Kuenigl* v. *Donnersmarck*.[20] Plaintiff had obtained a considerable sum of money under a contract made in 1940 but now sought to allege that the contract was invalid. Defendant argued that, since the contract was governed by German law, section 242 applied, and therefore it would be against good faith for plaintiff to assert the invalidity of the contract. That might have been true if a German court would have agreed that the contract was invalid. But in this case the contract was invalid under English law because it involved trading with the enemy; and Germany was the enemy, so that a German court would hardly hold invalid a contract which gave some economic advantage, however small, to Germany in time of war. McNair, J., therefore, concluded that the plaintiff was not debarred from pressing his remedies against the defendants. In any case the doctrine in question is only sparingly used even in German courts when the invalidity is based on public policy; and in all cases great discretion is left to the court.

(5) One of the most important applications of section 242 is in relation to frustration of contract. An unforeseen contingency happens, preventing the parties to a contract attaining the

barred debts, is much more limited in its operation. In Jewish law, if a man repays a debt in the Sabbatical Year (when loans are cancelled), it is said that the Sages are well pleased with him—see Mishnah, *Shebiith*, 10, 9.

18 The doctrine of *venire contra factum proprium*.

19 RGZ 71, 432.

20 [1955] 1 Q.B. 515. I am obliged to Dr. Cohn for lending me a copy of the judgment, the latter part of which has not been fully reported.

purpose they had in mind. Are they discharged from liability under the contract? In English law we have been torn between two tests.[1] On the one hand it is said that there is no discharge unless you can imply that the parties would have provided in the contract itself for its discharge in the event which happened —if only someone had called their attention to the matter. The other view is that there is no discharge unless the court thinks it just and reasonable that there should be a discharge. Perhaps on neither view would an English court hold the contract discharged because of a wholly abnormal rise or fall in prices or a sudden depreciation of currency.[2] Dr. Cohn, who has done so much to explain German law to English lawyers, has shown us the historical evolution of the German doctrines on this subject.[3] The ultimate solution reached was that for every contract there is a *Geschäftsgrundlage* (contractual basis), *i.e.*, a common assumption by the parties that certain circumstances form the basis of their contractual intention. If that basis is shattered the contract also disappears. But in many cases it may be unfair that one or both parties should be completely discharged from liability. So the courts used section 242 to reshape the rights and liabilities of the parties. (In English law we had to wait until a statute of 1943[4] before a real attempt was made to deal with the injustices which resulted from the common law treatment of the results of discharge by frustration or impossibility of performance.) When the German currency collapsed in 1923, debts expressed in the old currency became valueless. Could a debtor who owed RM.1000 insist on paying his debt in the old currency when RM.1000 was now only a worthless bit of paper? The courts used section 242 to convert the old debt into the new currency at a rate which appeared to be just and equitable between the parties. More recently the section has itself been said to be the foundation of the German principle of frustration. The collapse of the Reich after the Second World War meant that public bodies ceased to exist or stopped payments. Debtors who had worked for these bodies no longer received wages from

[1] See Cheshire and Fifoot, *Law of Contract* (4th ed. 1956), p. 458 *et seq.*; G. Webber, 'Frustration of Contract' (1951) 4 *Current Legal Problems*, p. 283 *et seq.*

[2] Goodhart, *op. cit.*, at p. 106.

[3] E. J. Cohn, 'Frustration of Contract in German Law' (1946) 28 *Journal of Comparative Legislation*, Parts 3 and 4, p. 15 *et seq.*

[4] The Law Reform (Frustrated Contracts) Act, 1943.

them and so could not pay their debts. A case in the local court of Tempelhof in 1946[5] held that a creditor who sued a debtor in these circumstances did not act in good faith. The debtor had to be given time to get himself in a position to pay his debt.

Many more examples of the application of section 242 could be cited if I had the time.[6] It is not surprising that Dr. Cohn says that this section, 'even more than public policy, is an unruly horse.' Indeed, like the Bible and the works of Aristotle in the Middle Ages, anybody can mount it, though at the risk that it may run away with him. Under the Nazis a new and unhappy feature appeared in the use of the section. The common usage to which it referred was now confined within the strait-jacket of the party ideology. It became contrary to good faith, restricted and distorted in this way, to adhere to contracts made with Jews or other anti-Nazis.[7] That lesson of experience makes one wonder whether it would be better to disconnect the interpretation of section 242 from all notions of public policy. But I think that the question is still an open one, and much depends on how a court interprets public policy.[8] In 1954 Dr. Bernard Danckelmann wrote that good faith is based on value judgments of the community as a whole or of a particular section of it, and that the parties to a contract are linked together with the community.[9] Public policy seems also to have entered into the adjustment of the relations of the parties under section 242. You will remember that the section is used, not only to determine the existence or non-existence of liability, but also to modify or refashion the obligations between the parties. Some stages of the recent *Volkswagen Case*[10] suggest that this is not done without

[5] *Suddeutsche Juristenzeitung* (1946), Vol. 1, p. 97.

[6] In the *Gemeinrecht* which was the German common law down to 1900, there had been an *exceptio doli* which was probably much wider than the Roman conception of that plea. It was originally intended that s. 242 should represent something much narrower and more in accord with the Roman notions. It may be, however, that the wide interpretation of the section has resulted, at any rate in some respects, in giving an even greater discretion to the judge than was given by the *exceptio doli* of the *Gemeinrecht*.

[7] Cohn, *op. cit.*, p. 23.

[8] See Dennis Lloyd, 'Law and Public Policy' (1955) 8 *Current Legal Problems*, p. 42 *et seq.*

[9] Palandt, *Bürgerliches Gesetzbuch* (12th ed. 1954), p. 206. See, also, Ennecerus-Lehmann, *Das Schuldrecht* (1950), pp. 17–18.

[10] For reports of this case, see *Neue Juristische Wochenschrift*, 1952, 137; 1955, 587; *Betriebsberater* 1955, 271. An even stronger decision in favour of considerations of public policy is RGZ 160, 257—a case in 1939.

regard to the interests of the public. Under the Nazi regime the Government created and sponsored a company to produce popular cars. Every person who contracted to buy one of these Volkswagen was called a 'saver.' You agreed to buy the car and pay for it by instalments; but you did not get the car until the full amount was paid up. The Nazi equivalent of a trade union congress—the *Deutsche Arbeitsfront*—collected the instalments and did much of the company's administrative work for nothing. At the end of the war the Nazi government ceased to exist. So did the *Deutsche Arbeitsfront*. The German currency again disintegrated. The whole Volkswagen scheme was discontinued, and some of the assets held by the *Deutsche Arbeitsfront* were confiscated by the Russians as Nazi property. But the company continued to exist and, soon after the war, began to produce private cars and was in fact showing yearly profits. Several savers then began an action against the company to get the cars for which they had saved. One of them had paid up the full contract price; another had paid only part of it. They invited the court to order delivery of the cars and offered to pay further adequate amounts in the new currency. One question before the court was whether the contractual basis of the contract had disappeared. Eventually the *Bundesgerichtshof* (the highest court in West Germany) returned the matter to the Appellate Court with a direction (*inter alia*) to ascertain certain facts and then to reconsider the question of the contractual basis. Our interest lies in the kinds of facts the Court was asked to ascertain. Here are some of them:

(1) How many of the original 336,000 savers can and will claim either cars or repayment of the purchase money?

(2) How much of the money collected from all savers was used either directly or indirectly for the purposes of the company?

(3) What is the present financial position of the company?

(4) What would be the effect on that financial position of a decision that the company must satisfy gradually all the savers' claims?

(5) How long would it take to satisfy those claims?

Some of these questions at any rate seem to involve considerations of public policy. But on a narrower view it could be said that the court was taking into account only the fact that this was a test action—the real parties being the company on the one

hand and any number up to 336,000 plaintiffs on the other hand. Good faith does require a certain amount of give and take. In this case the two plaintiffs would surely have known that they were testing the claims of thousands of other savers. It might therefore be in accordance with good faith that they in their turn should take into account all the consequences of the court's decision. Even if we regard these consequences as matters of public policy, we must ask ourselves whether or not it is better that those considerations should be applied consciously and openly by the court. The *Volkswagen Case* foundered on another rock—the non-existence of any contract between the savers and the company. But let us suppose there had been a contract. If such a case had come before an English court, one of two results would have followed. Either the car company would have been held discharged from their liability to deliver the cars, in which case the savers would have had to have their money back while the company would be able to retain its own expenditure in execution of the contracts down to the date of discharge. Or the company would have been held to be still liable to deliver the cars and would be liable in damages for failing to do so. On either result, there would be the possibility that the company might have had to go into liquidation, so that the savers would get only a dividend on the amounts they had saved. But in a German court, the effect of remodelling the obligations of the parties could well have been that the savers would be precluded from pressing their claims urgently, and that the company would be given sufficient time to satisfy the claims of the savers in turn while it continued to run its business as a going concern.

EPILOGUE

I have sought to establish that the legal principle of good faith in contracts, as originally conceived by the Romans, was in essence an appeal to common usage. It is arguable that the success of the German rules has been largely due to adoption of the same criterion, and that the comparative sterility of the French doctrine is due to an attempt to put good faith on too high a moral plane. The common man, however much he may pray for miracles, does not really expect them to happen. If the judge gives him more than he expects, he can do so only by taking

away more from the other party. To justify that action he is driven to exaggerate the standards of conduct which can be expected from the parties. It could be said, perhaps, that that is necessary in order to protect the common man against the uncommon man—against the impersonal giant company, the tycoon or even the criminal. Certainly in England the early Chancellors may have felt constrained to resort to some higher level of conscience in order to protect petitioners against the over-mighty subjects of those days. But this straining of morality is, to my mind, unnecessary. When I read of a lawyer trying to tread daintily in the china-shops of ethics, I wish that someone would lead him back into the streets where walk all manner of men. Plato wrote that 'good judges are those who have mixed with all sorts of people.'[11] And, seeking the happy mean among all sorts of people, I would be content with the common usages of the common man. In the Hebrew language there is a simple phrase which satisfies that requirement. It is *Derech Eretz.* It means 'the way of the land,' but it also means 'good manners.'

'And now abideth faith, hope, charity, these three.'[12] I have spoken to you of faith. My hope is that I have at least kindled your interest. 'But the greatest of these is charity.'

[11] Plato, *Republic,* III, 3, 408.
[12] The Epistle to the Romans, Chap. 13, 11.

3

GIFTS IN FAVOUR OF SPORT AND RECREATION

O. R. Marshall

Interest in sport and recreation generates in philanthropists the desire to make gifts or create trusts for the development of the sport or recreation in which their interests lie. The desire to give is, however, from more than one point of view, easier to form than its fulfilment is to achieve. I am not here concerned with the ramifications of the Betting and Lotteries Acts on schemes organised by supporters of football and other clubs,[1] but with the numerous other legal difficulties which must be overcome in order to make a gift or create a trust, the object of which is the promotion or furtherance of sport or recreation. Sometimes it is the validity of the gift itself which is at stake; sometimes it is a question of exemption, either total or partial, from income tax, stamp duty or other form of taxation. Sometimes the vitiating element is that of uncertainty or vagueness; sometimes it is the possibility of excessive duration. In short there are many aspects of the problem which require elucidation, and I hope in this paper not only to throw light on some of them but also to point the way to successful giving by our would-be philanthropist. There are many methods open to him each of which I shall now consider.

GIFTS TO EXISTING CLUBS AND ASSOCIATIONS

It is now settled that a gift to an unincorporated association beneficially is valid. It was at one time argued that such a gift was void because the legatee, not being a person in law, had no legal capacity and was incapable of taking property.[2] This argument was, however, decisively rejected in *Re Smith*[3] in

[1] See *Maynard* v. *Williams* [1955] 1 All E.R. 81; *Pearse* v. *Hart* [1955] 1 All E.R. 91.
[2] *Hogan* v. *Byrne* 13 Ir. C.L.R. 166; *Morrow* v. *M'Conville* 11 L.R. Ir. 236 at 243, 246, 250.
[3] [1914] 1 Ch. 937.

which the gift was held to be good on the ground that it was made to the several members individually who constituted the society. The fact that the gift might enure for the benefit of future members did not render it void for perpetuity since the members who took in the first instance had the entire equitable interest between them and could resettle the property so as to include others as and when they became members.

When the gift is made to the association for its general purposes it is upheld not on the ground that it is a gift to the members individually, but because it is for a trust which does not tend to a perpetuity and which is accordingly valid.[4] The authorities establish the rule that a gift to a perpetual institution is valid if the subject matter of the gift when paid is not subject to any trust which prevents the members or the committee of management from spending it as they please. The probability that they will not in fact so spend it is immaterial. It will, therefore, be seen that gifts either beneficially to, or for the general purposes of, bodies such as the Marylebone Cricket Club, the Athletic Association, the Football Association and the Central Council of Physical Recreation are perfectly valid. Care must, however, be taken to ensure that the body, which it is intended to benefit, is an association properly so called, and also that it is sufficiently described in the instrument of gift. Thus in *Re Thackrah*[5] a gift to the Oxford Group was held to fail since at that time the Group was not an association to which people could belong: it had no membership list, subscriptions, badge, rules or definite location. It need hardly be said that a gift to an incorporated club or association beneficially is perfectly valid, since the fact of incorporation gives legal personality to the beneficiary, but here too care must be taken to ensure that an invalid trust is not imposed on the subject matter of the gift.

The disadvantage of this method of giving is the inability to impose a specified perpetual trust with the consequent failure to associate the donor closely enough with the gift as, for example, by the creation of a fund bearing his name to be used for some particular purpose. The further disadvantage is that any income

[4] *Re Drummond* [1914] 2 Ch. 90 at 97.

[5] [1939] 2 All E.R. 4; the Oxford Group was subsequently incorporated as a company limited by guarantee but it was held not to be a body established for charitable purposes only. See *Oxford Group* v. *I.R.C.* [1949] 2 All E.R. 537.

which the subject matter of the gift produces will be liable to tax, unless the club or association can show that it has been expended for charitable purposes only.

GIFT FOR A SUFFICIENTLY DEFINED SPORTING OR RECREATIONAL PURPOSE FOR A PERIOD NOT EXCEEDING THE PERPETUITY PERIOD

Since the decision of Roxburgh, J., in *Re Astor*[6] in 1952, the validity of a gift of this type is, unfortunately, suspect, though, in my opinion, wrongly so. Suspicion stems from the ambiguous observations of Grant, M.R., in *Morice* v. *Bishop of Durham*[7]: 'Every other (*i.e.*, every non-charitable) trust must have a definite object: *There must be somebody in whose favour the court can decree performance.*' There are two possible interpretations of this. The first is that there must be a beneficiary who can apply to the court to compel performance of the trust. This was the view of Harman, J., in *Re Wood*[8] and of Roxburgh, J., in *Re Astor*.[9] According to them, the lack of a beneficiary is fatal except in gifts to charity and gifts by will for the maintenance of specified tombs or animals for a period not exceeding the perpetuity period. The exception in favour of charity is justifiable by the fact that the Attorney-General is charged with the duty of taking proceedings on its behalf, and that in favour of tombs and animals is said to be justified either as a concession to human weakness and sentiment or by the form of the order which the court makes in such cases. The order requires the trustee to give an undertaking that he will carry out the trust, and gives to the residuary legatee, who would be entitled to the legacy but for the trust for its application, liberty to apply to the court to prevent the trustee from misapplying the legacy or breaking his undertaking with regard to it. This is, however, an *ex post facto* rationalisation which does not apply to all the authorities. Thus *Gott* v. *Nairne*[10] shows that the exception is not confined to cases where the gift is made by will, but extends as well to *inter vivos* trusts; and *Re Thompson*[11] shows that it is wider in scope than the maintenance of tombs or animals. Accordingly,

[6] [1952] 1 All E.R. 1067. See 'The Failures of the Astor Trust,' (1953) 6 *Current Legal Problems*, p. 151.
[7] (1804) 9 Ves. 399 at 405.
[8] [1949] 1 All E.R. 1100.
[9] [1952] 1 All E.R. 1067.
[10] (1876) 3 Ch.D. 278.
[11] [1934] Ch. 342.

it is submitted that the second interpretation of the observations of Grant, M.R., is preferable. This is to the effect that the non-charitable purposes 'must be stated in phrases which embody definite concepts, and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty.' This is supported by *Re Douglas,*[12] a decision of the Court of Appeal, in which a gift of residue to be distributed among indefinite charitable objects and definite non-charitable objects within the discretion of the trustees was held to be good.

If, therefore, our would-be philanthropist is prepared to take the risk of creating a trust of this type, he should be advised that it will be necessary both to specify the objects with certainty, and to confine the operation of the trust within a period not exceeding that permitted by the rule against perpetuities. Both of these requirements were satisfied in *Re Thompson*[13] in which the testator bequeathed a legacy of £1,000 to a friend to be applied by him in such manner as he should think fit towards the promotion and furtherance of fox-hunting. It was held that on the friend giving an undertaking to apply the legacy towards the object expressed in the will, the legacy should be paid to him, but in case he should apply it otherwise than to the furtherance of fox-hunting, the residuary legatees were given liberty to apply to the court. On the other hand in *Re Nottage*[14] a bequest to provide annually for ever a cup to be given to the most successful yacht of the season was held void for perpetuity. In *Re Clifford*[15] a bequest to the Oxford Angling and Preservation Society to apply the income towards restocking their rivers was held void for the same reason as was the bequest in *Re Patten*[16] to the Sussex County Cricket Club on trust to pay the interest yearly to its Nursery Fund. It will be seen, therefore, that this is a perfectly valid method of giving, provided that the gift is confined within its legally permitted bounds. At the same time its limits are so severe and its disadvantages so many that it should be recommended with caution. For not only is its validity suspect, at least where it is created *inter vivos,* but it is also by definition non-charitable, with all the disadvantages thus entailed,

[12] (1887) 35 Ch.D. 472.
[13] [1934] Ch. 342.
[14] [1895] 2 Ch. 649.
[15] (1911) 106 L.T. 14.
[16] [1929] 2 Ch. 276 at 289–290; see also *Re King* [1931] W.N. 232.

and, worst of all, reliance is placed on the trustee's exercising his discretion according to the terms of the gift, and not on the law's ability to compel him to perform his trust.

GIFT ON TRUST FOR A SPORTING OR RECREATIONAL OBJECT WHICH IS ALSO CHARITABLE

It is quite clear that some forms of sport and recreation are capable of being charitable objects while others are not. Thus games in schools are not only recreational but charitable, whereas racing,[17] though recreational and not taxable, is presumably not charitable. It would be easy enough to multiply these examples, but it is much more difficult to draw the line between a charitable and non-charitable form of sport or recreation. An attempt must, however, be made to evaluate what the courts have done in this respect.

The gift is upheld when the furtherance of sport or recreation is not an end in itself but is one of the means of achieving an object which is unquestionably charitable. Thus in *Re Mariette*[18] a trust to provide Eton fives courts or squash-racket courts at Aldenham School was held to be valid and Eve, J., observed: 'It is a gift to an institution which admittedly is a charity within the Statute of Elizabeth, but I accede to the argument of the residuary legatees that it is quite possible that a gift to a charity may be of such a character as not to be in itself a charitable gift. On the other hand I think in considering whether a gift is charitable or not one must not confine oneself to the character of the gift itself, but must pay regard also to the character and objects of the charity who are the intended recipients of the gift. The object of this charity is the education, in the widest sense, of boys and young men between the ages of 10 and 19. No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind. It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily education, mental occupation by means of the classics and those other less inviting studies to which a portion of the day is devoted, and bodily occupation by means of regular and organised games. To

[17] *Sharkey* v. *Wernher* [1955] 3 All E.R. 493.
[18] [1915] 2 Ch. 284.

leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them but would probably result in their quickly relapsing into something approaching barbarism.' It is thus clear that where the sport is an incident of education, its furtherance is a charitable object. It is equally clear that where it is an incident of some other charitable object such as the promotion of the efficiency of the armed forces, its furtherance is likewise charitable. Thus in *Re Good*[19] a gift of a library and plate for an officers' mess and in *Re Gray*[20] a gift of a fund for the promotion of sport in a regiment were both held to be charitable, Farwell, J., observing in the former case[1]: 'I have come to the conclusion that this is a good charitable gift on the . . . ground . . . that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country.'

On the other hand, where the sport or recreation is itself the primary object of the trust, the question whether it is charitable is a more difficult one. One thing is clear. A trust of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area is a valid charitable trust. This was conceded to be possible by Lord Simonds in *I.R.C.* v. *Baddeley*,[2] whereas Lord Somervell did not wish anything which he said to be taken as throwing any doubt or light on the matter.[3] However, Lord Reid, in a dissenting speech, was emphatically of the opinion that such a gift was clearly charitable where the only possible types of recreation were those which could be enjoyed in the open air in a park or garden,[4] and in *Re Morgan*[5] such a gift was held to be charitable by Harman, J. Beyond this there is doubt and difficulty. Cases which at first sight seem to uphold, as charitable, trusts in which the primary object was some form of recreation are on close analysis found to be decided on the basis that the form of recreation in question was educational. Thus in *Re Shaw's Will Trusts*[6] a trust for the

19 [1905] 2 Ch. 60.
20 [1925] Ch. 362; see comments on these two cases in *I.R.C.* v. *City of Glasgow Police Athletic Association* [1953] 1 All E.R. 747.
1 [1905] 2 Ch. 60 at 66.
2 [1955] 1 All E.R. 525 at 532.
3 *ibid.*, at p. 549; cf. his statement two paragraphs earlier.
4 *ibid.*, at p. 536.
5 [1955] 2 All E.R. 632.
6 [1952] Ch. 163.

teaching *inter alia* of the arts of personal contact and social intercourse to the Irish was held to be charitable on the ground that the whole object of the trust was to provide a sort of finishing school for the Irish people, though Vaisey, J., refused to speculate on how the people of Ireland would react to such intensive treatment as the testatrix appeared to envisage. In *Royal Choral Society* v. *I.R.C.*[7] a society formed for the encouragement and advancement of choral singing was held to be a body established for the charitable purpose of promoting æsthetic education, Lord Greene, M.R., observing[8]: 'It is not the state of mind of the people who go to the performance which matters for the present purposes, it is the purpose of the people who provide it which is important. If the people who are providing the performance are really genuinely confining their objects to the promotion of æsthetic education by presenting works of a particular kind, or up to a particular standard, it seems to me that that is just as much education (and, in fact, having regard to the subject-matter the best available method of education) as lecturing or teaching in a class, or anything of that kind. The Solicitor-General referred to a number of cases in which he said it was established that education in the charitable context is limited to teaching in that narrow sense. In my opinion, these cases do not establish any such proposition. I should be very sorry to think that they did. The matters that were being dealt with in those cases have nothing to do with æsthetic education or the cultivation and improvement of public taste in music or the other arts. I cannot help thinking that the Board of Education, which has taken the Council for the Encouragement of Music and the Arts under its wing, would be very surprised to learn that that enterprise, in which public funds are now being used, was not an educative one.' So too *Re Dupree's Trust*,[9] in which a trust for the encouragement of chess-playing among boys and young men under 21 in Portsmouth was held charitable, was decided largely on a headmaster's evidence that chess-playing formed an important part of the curriculum of his school. Where, however, the sport or recreation is neither ancillary to a charitable purpose nor in itself educative, the possibility of its

[7] [1943] 2 All E.R. 101.
[8] *ibid.*, at p. 105.
[9] [1945] Ch. 16.

being charitable is a slight one. Thus in *I.R.C.* v. *City of Glasgow Police Athletic Association*[10] the question was whether the association was a body established for charitable purposes only within the meaning of section 30 of the Finance Act, 1921, in which case the profits arising from its annual athletic sports would be exempt from tax. Rule 2 of the Association declared its objects to be 'to encourage and promote all forms of athletic sports and general pastimes.' It was common ground between the parties that if this object had to be considered *in vacuo* it would not be charitable, but it was argued that the real though unexpressed object of the association was the promotion of the efficiency of the police force and that the promotion of athletics was merely incidental to this. But this was rejected by the majority of the House of Lords. 'Even if I were satisfied,' said Lord Morton,[11] 'that there exists some other purpose for which the association was or is established, for instance, the purpose of maintaining the strength and efficiency of the police force, I should find it impossible to say that the *sole* purpose of the association is a purpose which is nowhere even mentioned in the constitution and general rules, and that the purpose which emerges so clearly in the rules and on which the income of the association appears to have been expended ever since it came into existence is either non-existent or merely incidental.' In *Williams' Trustees* v. *I.R.C.*[12] a trust was established for the purpose of maintaining an institute 'for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art.' The trust property consisted of two buildings, one of which was let out to tenants, and the other occupied by the London Welsh Association Ltd. This Association had been incorporated for substantially the same purposes as those contained in the deed of trust. The trustees applied the rents of the first building and made certain gifts to the Association intending that they should be directed to various purposes including public lectures and debates, a music club, literary and educational classes, the main-

[10] [1953] 1 All E.R. 747.
[11] *ibid.*, at p. 755.
[12] [1947] 1 All E.R. 513.

tenance of the headquarters' premises, badminton and table tennis clubs, dances, whist and bridge drives, an annual dinner and garden party, a weekly social and dance, and the provision of a central information bureau. The trustees admitted that the purposes of the Association were not exclusively charitable, but contended that they themselves were so established and that in applying the rents of the first building to the purposes of the Association they had applied them to charitable purposes only and that accordingly they were entitled to exemption from income tax in respect of the rents of that property. It was held by the House of Lords that on the true construction of the trust deed the property was not vested in the trustees for charitable purposes only, and on the facts that the rents applied to the purposes of the Association were not applied for charitable purposes only. In the course of his speech Lord Simonds observed[13]: 'It is clear, as I have already said, that they (*i.e.*, the trustees) have not applied the income for charitable purposes only, and I do not doubt that they have applied it strictly in accordance with their trust.' As Lord Reid observed in his dissenting speech in *I.R.C.* v. *Baddeley*,[14] recreation and entertainment were so prominent, both in the objects and in the activities of the association, that they could not be regarded as mere adjuncts of other and charitable purposes. Perhaps, however, the biggest obstacle in the way of a gift of this type being held charitable is the *Baddeley Case* itself. The short issue in the case was whether a conveyance of land to trustees required to be stamped at a reduced rate under section 13 of the Stamp Act, 1891, by virtue of the fact that the trusts upon which it was held were exclusively charitable. The object of the trust was 'the moral social and physical well-being of persons resident in the county boroughs of West Ham and Leyton who for the time being were . . . or were likely to become members of the Methodist Church and who were of insufficient means otherwise to enjoy the advantages provided.' The method by which the object was to be attained was 'by the provision of facilities for moral, social and physical training and recreation and by promoting and encouraging all forms of such activities.' The House of Lords by a majority of four to one held that the objects were not exclusively charitable and that the trust

[13] *ibid.*, at p. 520.
[14] [1955] 1 All E.R. 525 at 540.

accordingly failed. 'I do not think,' said Lord Simonds,[15] 'it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word "social." On the contrary, I find in its use confirmation of the impression that the whole provision makes on me, that its purpose is to establish what is well enough called a community centre in which social intercourse and discreet festivity may go hand in hand with religious observance and instruction. No one will gainsay that this is a worthy object of benevolence, but it is another question whether it is a legal charity, and it appears to me that authority which is binding on your Lordships puts it beyond doubt that it is not . . . we must ask whether the whole range of prescribed facilities or activities (call them what you will) is such as to permit uses which are not charitable. If it is, it is not such a trust as the court can execute and it must fail.' Lord Porter, Lord Tucker and Lord Somervell agreed with this conclusion. Lord Simonds, however, went further and expressed the view that 'a trust cannot qualify as a charity within the fourth class in *Pemsel's Case* (*i.e.*, as being of general public utility) if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed.[16] Lord Somervell appeared to agree with this when he said[17]: 'there might well be a valid trust for the promotion of religion benefiting a very small class. It would not follow that a recreation ground for the exclusive use of the same class would be a valid charity, though it is clear from the Mortmain and Charitable Uses Act, 1888, that a recreation ground for the public is a charitable purpose.' Lords Porter and Tucker preferred to express no opinion on this point. Lord Reid dissented on both grounds. He was prepared to hold that moral social and physical training was either an object of general public utility or an educational purpose, even though he admitted that recreation by itself might not be. 'At least,' he said,[18] 'I cannot think of any activity which would come within those words but would not be educational in character, and I

[15] *ibid.*, at p. 530; relying on *Farley* v. *Westminster Bank* [1939] 3 All E.R. 491; *Dunne* v. *Byrne* [1912] A.C. 407; *Houston* v. *Burns* [1918] A.C. 337; *Williams Trustees* v. *I.R.C.* [1947] 1 All E.R. 513; and *Londonderry Presbyterian Church* v. *I.R.C.* [1946] N.I. 178.

[16] *ibid.*, at p. 534.

[17] *ibid.*, at p. 549; see footnote 3, p. 44, *ante*.

[18] *ibid.*, at pp. 538–539.

adopt the words of Lord Greene, M.R., in *Re Strakosch*[19]: 'If the object and the means indicated are clearly charitable, then the court is not astute to look for possible, but subsidiary, non-charitable means which might be within the words used.' He admitted that in some contexts social training might mean training in those arts and graces which were sometimes supposed to facilitate admittance to certain more exclusive circles of society, but he thought that its meaning in this conveyance was the teaching of the value of endurance and perseverance, of assiduous practice, of unselfish association in a team, and of winning with modesty and losing with a good grace.[20] Further he was satisfied that there could be a valid charitable trust within Lord Macnaghten's fourth division in favour of a class of the community defined otherwise than by reference to all the inhabitants of any particular area. This was supported by *Verge* v. *Somerville*[1] in which a trust within the fourth class of Lord Macnaghten's classification was held valid although its object was not to benefit the whole of New South Wales, but only those men from that State who had served in the war and had returned to their native land. This was a Privy Council decision, but the House of Lords had reached the same conclusion in *Goodman* v. *Mayor of Saltash*[2] in which the beneficiaries were not all the inhabitants of the borough but only those who occupied ancient messuages within it. It is notoriously difficult to find the *ratio decidendi* of any House of Lords decision. Perhaps it is only because this is so that the full consequences of the rule that the House of Lords is bound by its own decisions are not always felt. Nevertheless it is important to attempt to state what the *Baddeley Case* decided. In the first place it is submitted that the case has not altered the rule that if the dominant purpose of the trust is charitable in character the fact that recreation is provided as an adjunct to that purpose does not destroy the charitable character of the trust: in other words the case merely decided that in this particular conveyance the recreation contemplated was itself a separate and non-charitable object of

[19] [1949] 2 All E.R. 6 at 9.
[20] For the Educational activities of the Central Council of Physical Recreation see 'A Pleasure to Study: Recreation Council's Popular Courses,' *The Times*, January 6, 1956.
[1] [1924] A.C. 496.
[2] (1882) 7 App.Cas. 633.

the trust. In the second place, it is submitted that the case has not established a criterion of public benefit required for cases coming within Lord Macnaghten's fourth class which is different from that required for the other three classes. Only Lord Simonds and Lord Somervell thought that this should or might be so, and it is to be regretted that despite his protest to the contrary Lord Simonds should have felt it necessary to add this refinement to an already over-refined topic.[3] Be this as it may, it must be admitted that a trust in the terms of the *Baddeley Case* would fail and one using more specific terms would require further litigation to determine its validity. It is therefore suggested that legislative reform is called for, not only to prevent unnecessary litigation, but also to widen the scope of this type of charity as at present conceived. In this connection it is worth while recalling the instances of legislative intervention in this field which were so admirably used by Lord Reid in substantiation of his dissent. Thus under the Recreation Grounds Act, 1859, land conveyed for the 'regulated recreation' of adults or for playgrounds for children was regarded as land conveyed for a charitable purpose. Section 6 of the Mortmain and Charitable Uses Act, 1888, enacts that Part 2 of the Act which relates to assurances to charitable uses shall not apply to an assurance of a limited amount of land for the purposes of a park, garden, or other land dedicated to the recreation of the public. This section necessarily involved the conclusion that the dedication of land to the recreation of the public was a dedication to a charitable use, and it was so held by Clauson, J., in *Re Hadden*[4] by Luxmoore, J., in *Re Foakes,*[5] and by Bennett, J., in *Re Chesters,*[6] and moreover nothing that was said in the *Baddeley Case* has affected this in any way as was shown by the recent decision in *Re Morgan.*[7] Section 3 of the Open Spaces Act, 1906, provides for land held by trustees on trust for the purposes of public recreation to be transferred to a local authority and for the conditions of the trust to be varied with the approval of the Charity Commissioners. The Physical Training and Recreation Act, 1937, makes provision for the training of P.T. Teachers

[3] [1955] 1 All E.R. 525 at 528.
[4] [1932] 1 Ch. 133.
[5] (1933) unreported.
[6] (1934) unreported.
[7] [1955] 2 All E.R. 632.

and Leaders and for the provision of gymnasia, playing fields, holiday camps, camping sites, and centres for clubs. Section 86 of the Education Act, 1921, enabled an education authority to supply or maintain facilities for social and physical training in the day or evening. Section 53 of the Education Act, 1944, imposes a duty on every local education authority to secure that the facilities for primary, secondary and further education include facilities for recreation and social and physical training and section 41 (*b*) of the Act defines further education to include 'leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by the facilities provided for that purpose.' The Nathan Committee on Charitable Trusts clearly considered the above purposes to be charitable,[8] and one would have thought that Parliament had made it reasonably clear by necessary implication. However, since the House of Lords has now held otherwise it is submitted that Parliament should make its meaning clearer by express words. In this connection it is interesting to note that the American Restatement of the Law of Trusts clearly upholds the charitable character of this type of trust. Thus 'a trust for the purpose of supplying a community with facilities ordinarily supplied at the expense of the taxpayer is charitable.'[9] . . . 'A trust to promote the happiness or well being of the members of the community is charitable. . . . A trust to provide public facilities for swimming and other sports is charitable. Some of these trusts can be supported on the ground that they tend to promote the health of the community, or involve a form of education; but it is sufficient that they promote the general happiness of the community.'[10] . . . 'A trust to promote the happiness or well being of persons who although they are not poverty stricken have few opportunities for recreation and enjoyment is charitable.'[11] . . . 'A trust to establish or maintain an institution to improve the moral, intellectual and physical standards of young men and young women is charitable. Thus a trust to maintain a Young Men's or Young Women's Christian Association, maintaining a building offering to young people

[8] Cmd. 8710 (1952) pp. 204–205.
[9] para. 373, comment (a).
[10] para. 374, comment (f).
[11] *ibid.*, comment (g).

facilities for reading, exercise, social meetings, board and lodging at reasonable rates is charitable.'[12] It may well be that a little Americanisation in this field is overdue.

Success in charitable giving is most satisfactory to the donor, but its achievement in this field is uncertain. If achieved, it has the advantage that the income of the trust is exempt from taxation, and the duration of the trust may be perpetual; if not achieved, the crowning disadvantage is that the trust itself will fail. It is recommended, therefore, that if our would-be philanthropist wishes to create a charitable trust in favour of some form of sport or recreation, he should be advised to bear in mind the limits of the charitability of this type of trust, for if he goes outside these limits, all his good intentions will come to nought.

FORMATION OF A COMPANY WITH THE DESIRED OBJECTS AND AN ABSOLUTE GIFT THERETO

If there is no existing body or association whose objects coincide with those which the donor has in mind, it is open to him to form an association of his own, preferably a corporate one under the Companies Act, 1948, and to make an absolute gift thereto. He can then be assured that his gift will be valid, though whether the income which it produces will be exempt from tax will depend on whether the objects of the company are exclusively charitable. Litigation may be necessary to settle this point, but if it should be held that the objects of the company are not exclusively charitable, all non-charitable objects could be excluded by an alteration of the memorandum of association in accordance with the procedure laid down by the Companies Act, 1948, and the company would get the benefit of exemption from income tax for the future. This method is preferable to the creation of a charitable trust because, first, it eliminates doubt about the validity of the gift and, secondly, it relies on the power conferred by law upon a company to alter its objects, whereas a similar power expressly conferred on trustees to alter the terms of the trust might be open to the objection, at least where the trust was created by will, that it involved excessive delegation of the testamentary power.

[12] *ibid.*, comment (g).

CREATION OF A POWER OF APPOINTMENT AMONG SPORTING OR RECREATIONAL OBJECTS

Re Park[13] and *Re Jones*[14] establish the validity of a power of appointment which is neither special nor general. The distinguishing feature of a special power is the certainty of the objects of the power, and that of a general power is the ability of the donor of the power to appoint the property to himself. In the *Re Park*[15] and *Re Jones*[16] type of power, the objects are not certain but the donor cannot appoint to himself. The scope of a power of this type is, however, restricted, for if a duty is imposed on the donee of the power to exercise it, and the class is unascertainable, the power will fail. Provided, however, that the donor is satisfied to leave the distribution of the fund to the discretion of the donee the fact that the class is unascertainable will not invalidate the gift. The disadvantages of this type of gift are, first, the inability to impose a duty on the donee: all that can be validly conferred is a discretion and it may be that the donor will not be satisfied with this; and secondly the fact that both the creation and exercise of the power will be subject to the rule against perpetuities. Its particular advantage is that it by-passes the need for certainty of objects.

GRANT OF A LONG LEASE OF LAND TO LESSEES SUBJECT TO A COVENANT BY THEM TO USE THE LAND FOR THE SPECIFIED SPORTING OR RECREATIONAL OBJECT

It is clear that the burden of a positive covenant contained in a lease runs with the land so as to bind assignees provided that the covenant touches and concerns the land and provided that there is a legal assignment of the whole residue of the term. A covenant as to user clearly touches and concerns the land, and while it is true that equitable assignees and sub-lessees will not be liable to the lessor, the fact that the original lessee will himself continue to be liable throughout the term will ensure that he will require a covenant of indemnity to be inserted in the equitable assignment or sub-lease, as the case may be. It should

[13] [1932] 1 Ch. 580; doubted in the Australian case of *Tatham* v. *Huxtable* (1950) 81 C.L.R. 639, but followed in *Re Gestetner* [1953] Ch. 672 and *Re Coates* [1955] 1 All E.R. 26 and distinguished in *I.R.C.* v. *Broadway Cottages Trust* [1954] 3 All E.R. 120.

[14] [1945] 1 Ch. 105; cf. *Re Harvey* [1950] 1 All E.R. 491.

[15] [1932] 1 Ch. 580.

[16] [1945] 1 Ch. 105.

be pointed out, however, that, for the covenant to be enforceable at all, it must be drafted in definite and precise terms, and it should also be noted that being a covenant it is untrammelled by the operation of the Rule against Perpetuities. The particular advantage of this method is the possibility it affords of enlarging the lease into a fee simple. Section 153 of the Law of Property Act, 1925, enables this to be done if the original lease was for at least 300 years of which not less than 200 are still unexpired; if there is no trust or right of redemption in favour of the revisioner; if there is no right of re-entry to forfeit the lease for breach of condition, and if no rent of any money value is payable. A rent of 'one silver penny if lawfully demanded' is a rent of no money value, but a rent of three shillings is not. A rent which does not exceed £1 per year and which has not been paid for a continuous period of twenty years (five having elapsed since 1925) is deemed to have ceased to be payable. Section 153 (8) of the Law of Property Act provides that 'the estate in fee simple so acquired by enlargement shall be subject to all the same . . . covenants . . . relating to user and enjoyment . . . as the term would have been subject to if it had not been so enlarged.' This enables the burden of a positive covenant to be annexed to a fee simple, notwithstanding the general rule to the contrary. The question might be raised whether the burden of covenants so annexed endure only so long as the lease would have continued. It is suggested that the lease having been enlarged, the covenants remain annexed to the lease under its new name, and therefore continue for ever.

CONVEYANCE OF AN ESTATE IN FEE SIMPLE IN THE LAND TO THE GRANTEE SUBJECT TO A COVENANT TO USE IT FOR THE SPECIFIED SPORTING OR RECREATIONAL PURPOSE

Although the burden of a positive covenant does not run with the freehold, there are various methods whereby this object can be achieved indirectly. The most obvious arises from the fact that the original grantee will remain liable on the covenant even after he has parted with the land. He will accordingly try to protect himself by taking a covenant of indemnity from his grantee against future breaches of the covenant. In this way a chain of liability is indirectly established between the original grantor and the present owner, but although this chain may be

strengthened by the original grantor requiring his grantee to take an indemnity from his immediate successor and impose an obligation on that successor to take an indemnity from his successor and so on, nevertheless with each conveyance the chain of covenants becomes longer and it is more likely to become ineffectual by the insolvency or disappearance of one of the parties to it. My learned colleague Mr. Scamell has developed the matter fully in his article in *The Conveyancer* and made many ingenious suggestions whereby enforceability can be attached to the burden of positive covenants in conveyances of the fee simple.[17] The one most applicable here is the use of the rent charge. The grantor would convey the fee simple to the grantee who would covenant to use the land for the specified purpose. The conveyance would reserve a perpetual yearly rent charge of £100 in favour of the grantor but there would be a proviso that if the grantee faithfully performed his covenant the amount of the rent charge would be reduced to £5. The conveyance would also include the usual proviso for re-entry for non-payment of any instalment of the rent charge. As Mr. Scamell points out[18]: 'By such an arrangement it is suggested that the desired object would usually be attained. With careful drafting, no question of penalties should arise and the likelihood of B (*viz.*, the grantee) redeeming the rent charge would be very small owing to the large amount of compensation which would presumably be payable.'

CONVEYANCE OF AN ESTATE IN FEE SIMPLE IN THE LAND TO THE GRANTEE SUBJECT TO A COVENANT BY HIM NOT TO USE IT FOR ANY PURPOSE OTHER THAN THE SPORTING OR RECREATIONAL PURPOSES SPECIFIED

This differs from the preceding heading in that the covenant here is a negative or restrictive one and it has been settled ever since *Tulk* v. *Moxhay*[19] in 1848 that the burden of such covenants runs with the land in equity provided that (1) the covenant is negative in substance, (2) the grantor at the date of the covenant owns land which will benefit from the covenant, and (3) the burden of the covenant is attached to the grantee's land. If these three conditions are satisfied and if the covenant

[17] E. H. Scamell, 'Positive Covenants in Conveyances of the Fee Simple' (1954) 18 *The Conveyancer*, p. 546.
[18] *ibid.*, p. 563.
[19] (1848) 11 Beav. 571.

is registered it will bind not only the original grantee but any one into whose occupation the land may subsequently come. The disadvantages of this particular method are first, that it does not impose any positive obligation on the grantee and his successors in title who will accordingly not be liable if they let the land lie waste and, secondly, that it may be difficult to show that the covenant was imposed for the benefit of any land retained by the grantor.

This account of the various methods of making a valid gift in favour of an object of sport or recreation is not exhaustive, and could no doubt be enlarged and improved by the ingenuity of conveyancers,[20] but it will have served its purpose if it has brought home to our would-be philanthropist and to his legal advisers that all is not lost merely because his particular form of philanthropy is not legally charitable.

[20] I have in mind, in particular, the method of the licence, the status of which, is, however, so uncertain that its use would be at least as risky as the attempt to create a charitable trust.

4

MENS REA AND VICARIOUS RESPONSIBILITY

GLANVILLE WILLIAMS

STRICT RESPONSIBILITY

JUDGES in the eighteenth and first half of the nineteenth centuries did not construe penal statutes literally; they construed them strictly, which was a different thing. Strict construction was a most excessively literal construction, but it worked only against the operation of the statute and in favour of the accused. When the literal construction did not favour the accused, judges regarded themselves as free to narrow the ambit of penal legislation in other ways, as by applying presumptions, particularly the presumption of the requirement of *mens rea*. In short, strict construction was never applied against a defendant in a penal proceeding, but only for his benefit.

England was not alone in adopting the principle of strict construction, though its pedantic application in some cases, which was due to the desire of the judges to mitigate our ferocious penal system, was peculiarly English. It is quite a common rule in penal systems that legislation must in case of doubt be given the construction favourable to the accused. This is merely an application of the principle *Nulla poena sine lege*.

During the last hundred years we have witnessed in England a subtle but decisive change in the approach. Lip-service is still paid to the principle of strict construction of penal statutes, but the practical effect is chiefly to benefit employers who are sued in tort for the breach of duties imposed by industrial legislation. This is because it is only the civil courts that effectively apply the principle. In criminal prosecutions little is heard of it; in its place we have, too often, a literal interpretation of penal statutes—an interpretation which may favour either side, but which, by denying the existence of exemptions that are not set out at length in the legislation, generally works against the accused. One result of this is the abandonment of the require-

ment of *mens rea* for many offences. The new literal approach gives rise to what is called 'absolute prohibition' or 'absolute liability' or (better) 'strict responsibility,' because a defendant who falls within the words of the statute is convicted without inquiry into his state of mind.

A recent illustration of the present trend in interpretation is supplied by the second of a pair of twin cases, *James & Son Ltd.* v. *Smee* and *Green* v. *Burnett*.[1] Both arose under the Motor Vehicles (Construction and Use) Regulations, 1951, regulation 75, which requires the braking system of vehicles to be maintained in good order, and regulation 101, which penalises any person who 'uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of' the regulations including regulation 75. The first case will be considered later in connection with vicarious responsibility. In the second case, *Green* v. *Burnett,* the driver of a motor-van was prosecuted for driving it with defective brakes, so that a collision was caused. It was held by the Divisional Court, directing a conviction, that the regulations laid down an absolute prohibition against user in contravention thereof. This is, apparently, the first time that the regulations in question have been construed as creating an absolute prohibition for the purpose of a criminal prosecution. Such a construction had, indeed, been adopted in *Vinall* v. *Howard,*[2] but that was a civil case. Moreover, in *Green* v. *Burnett* there was no need for the court to say that the prohibition was absolute, at least so far as the responsibility of the driver was concerned, because the facts showed that he had been negligent. When driving the van on the day before the collision, the defendant driver had had to 'pump' the brake pedal in order to cause the necessary braking effort to be exerted, and the necessity to 'pump' the pedal indicated some deterioration in the braking system. This being so, the conviction of the driver might be said to be clearly right, because it obviously accords with the intention of the legislature that a provision relating to safety on the roads should be construed as imposing responsibility for negligence. However, the judgment according to its wording would render responsible the driver of a motor vehicle if the brakes have unexpectedly developed a fault, even though he has used every care and had no

[1] Both reported in [1955] 1 Q.B. 78.
[2] [1953] 1 W.L.R. 987.

reason to suspect the fault. He might, for instance, be able to show that he had had the brakes tested the previous day, and had not used the vehicle between the test and the occasion on which the accident occurred. It is difficult to see what social purpose would be served by registering a conviction on facts like these. One hopes that in practice he would receive an absolute discharge, and indeed the court in the earlier case, *James & Son Ltd.* v. *Smee,* intimated that the police in the wise exercise of their discretion should not prosecute unnecessarily. Parker, J., said: 'Where legislation, as here, throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark.' A man who is already 'up to the mark' presumably does not need punishment to keep him there. However, if it be admitted that there is no social purpose in punishing those who are not at fault, why should the law impose even technical responsibility?

No reason was given in the majority judgment for construing the regulations as imposing an absolute prohibition. In the minority judgment of Slade, J., there is the statement that 'the law is well settled that liability for contravention of an absolute prohibition depends upon the fact of contravention and not upon the intention to contravene.' This, if carefully examined, will be seen to be true by definition, so that it does need the invocation of authority to support it: an absolute prohibition *means* one in which responsibility for contravention does not require intention (or recklessness). The only other possibility would be to interpret 'absolute prohibition' in Slade, J.'s remark to mean any statutory prohibition in which no qualification in respect of *mens rea* is expressed; the remark would then mean that when Parliament has not expressed such qualification, no requirement of *mens rea* can be implied. It is submitted that this would be going too far, because it would entail the final demise of the presumption of the requirement of *mens rea* in all its applications. In fact the 'absolute prohibition' approach is generally confined to statutes creating lesser offences, and is not always adopted even for these. When the court construes a particular statute as imposing an absolute prohibition, it can properly do so only by way of interpreting the probable intent of the legislature or (perhaps) by way

of giving effect to assumed social policy. That a prohibition is absolute is not a starting-point, as judges only too frequently treat it, but is (or should be) the conclusion of a process of reasoning directed to the construction of the statute. The mere fact that no requirement of *mens rea* is expressed in the statute is insufficient to justify the conclusion that the prohibition is absolute, because it is open to the court to imply the requirement.

For the particular offence considered in *Green* v. *Burnett,* there is no doubt that responsibility merely on the basis of *mens rea* would be too limited. Having regard to the appalling slaughter on the roads, it is clearly necessary for those who use motor vehicles to take the utmost care to see that they are in proper condition. It would have been more satisfactory if the regulation had been drafted to enact this duty expressly. However, the draftsman knew that judges do not defeat the purpose of modern legislation by implying a requirement of *mens rea*; and he therefore considered himself safe in omitting reference to the question. But even if *mens rea* is not required, the question still remains whether there should not at least be implied a requirement of fault. It was the judges who created the presumption of a requirement of *mens rea,* and they did so partly on grounds of justice and partly as an expression of what the legislature would probably intend. If the presumption is inapplicable to a particular piece of legislation, it is still possible to act in accordance with its spirit by refusing to penalise those who are utterly without fault. In other words, the presumption of a requirement of *mens rea* can, for specific types of legislation, be replaced by a presumption of a requirement of fault (including inadvertent negligence).

A good instance of this approach is *Leicester* v. *Pearson,*[3] which decided that the Pedestrian Crossings Regulations, though in terms absolute, were to be construed only as imposing responsibility for negligence. After all, it is well understood that the ordinary responsibility in respect of the management of vehicles on the highway is a responsibility to use care. Even in the field of civil liability, which looks to the compensation of the victim, there has been no policy decision by Parliament or the judges to give a remedy against a non-negligent motorist. Still less, then, should such a motorist be punished in a criminal proceeding. It

[3] [1952] 2 Q.B. 668.

is curious to place the decision in *Leicester* v. *Pearson* side by side with that in *Green* v. *Burnett*. A motorist who runs down a pedestrian on a crossing in a fog is punishable only for negligence, notwithstanding that he has infringed the letter of the regulations. Why should he be strictly responsible if he runs down a pedestrian because his brakes have inexplicably failed?

VICARIOUS RESPONSIBILITY

Even where the court construes a statute as creating an absolute prohibition, the defendant must be shown to come within the words of the statute. If he does not, no principle of construction enables him to be convicted. An offence of absolute prohibition is one in which the court refuses to imply exceptions; it is not one that is extended beyond its words. Since the statute always specifies the *actus reus*, that is to say, the criminal conduct which is intended to be forbidden, the defendant to be convicted must have committed this *actus reus*. It is not enough to show that a third party committed it, and it is not even enough to show that the defendant's servant committed it in the course of his employment. There is no 'vicarious responsibility' in criminal law. Such, at least, was the doctrine recognised until the later years of the last century. Since then, some instances of vicarious responsibility have been recognised, but their precise extent is a matter of some difficulty.

One instance, at least, must be taken as clear. This is where a person having a public licence delegates to a servant the management of the business in respect of which the licence is granted. Here the licensee becomes vicariously responsible not only for the acts but even for the states of mind of his delegate, though the statute makes no mention of the situation. The usual application of this rule is to publicans who delegate the running of the licensed premises to managers. It seems that the 'licensee' rule is almost the only open departure which the courts take from the wording of criminal statutes. In all other cases, with one isolated exception about to be mentioned, even though vicarious responsibility is created in fact, it is done under the guise of interpreting the words of the statute. Consequently, apart from the licensee cases, there is no instance of a master being convicted of a crime requiring *mens rea* merely on account of the *mens rea* of his servant. Where the master is convicted, it is

because he himself has the requisite *mens rea* although it is his servant who commits the *actus reus,* or else the offence is one not requiring *mens rea.* The solitary exception is *Mousell Bros., Ltd.* v. *L. & N.W. Rly.,*[4] where a company was held vicariously responsible for an offence requiring *mens rea,* namely, the act of its manager in giving a false account with intent to avoid payment of tolls. The best explanation of this decision seems to be that it belongs to an intermediate stage in the development of corporate criminal responsibility. At the present day, the company would be held responsible in such circumstances not on the ground of vicarious responsibility but because the act or state of mind of a director or manager would be imputed to the company as its personal wrong. In other words, the decision would—or should—be rested emphatically on the ground that the servant concerned was a superior or directive servant; it would not apply if the servant were an inferior one, because the state of mind of an inferior servant is not imputed to the corporation. For inferior servants the only responsibility of the company would be vicarious, and in this respect a corporate master is to be judged on exactly the same principles as a private master.

We come, then, to vicarious responsibility which is regarded as following from the words used by the legislature. The problem is to know when the courts will regard a master as doing something, within the meaning of a statute, although the act is actually done by his servant. Observe that the problem here is whether the master can be convicted as a principal in the first degree; it is not a problem of the master as a secondary party, because that is governed by different considerations. Of course, if the master authorises a criminal act by his servant, he becomes a secondary party in respect of the servant's crime. But in order to bring this doctrine into play the master must authorise not merely the class of act but the act in the particular circumstances in which it is unlawful. If a master authorises a servant to drive a car, he does not thereby become responsible for the servant's exceeding the speed limit; he is responsible only if he authorises him to exceed the speed limit. Even where the offence by the servant is one of strict responsibility, the master cannot become a secondary party (accessory before or principal in the second degree) in the absence of *mens rea.* This is because of the

[4] [1917] 2 K.B. 836.

principle that a person cannot be convicted as secondary party to a crime in the absence of *mens rea,* whether or not the crime itself is of strict responsibility.[5] Thus, if a master is to be convicted of his servant's crime without personal *mens rea,* he must be convicted as the actual perpetrator of the crime—as principal in the first degree—the act of the servant being fictitiously imputed to the master. The question is when this line of approach is legally possible.

There is one instance in which it is comparatively easy and in fact well established. This is under legislation like the Food and Drugs Act, prohibiting the sale of improper goods. The word 'sale' is capable of being construed in two meanings: as referring to the physical act of using words of sale or signing the contract, whether on one's own behalf or on behalf of someone else, or as referring to the legal relationship of seller and buyer. In interpreting criminal statutes the courts read the word in both senses, thus throwing the net both over the servant or agent who physically sells and over the master or principal who legally sells. In effect this means that the master becomes vicariously liable for his servant who sells in breach of the statute. The construction of the statute to include the master is possible only where the master is bound by the contract of sale according to the principles of the civil law; if the servant had no authority to effect a sale of any kind, the master is not responsible.

Where the statute refers not to a legal transaction like sale but to a purely physical act like 'entering' or 'making,' the traditional principle of the common law has been that the act of the servant cannot be regarded as the act of the master. The fiction *Qui facit per alium facit per se* was not extended to the construction of penal statutes: to do so would obviously have been a breach of the rule of strict construction, if not, indeed, of elementary justice and sound penal policy. There has, however, been a thin stream of decisions, belonging almost entirely to the present century, which has in particular contexts reversed the old rule of interpretation and chosen the wider meaning of a verb against the master. One is *Grade* v. *D.P.P.*,[6] a prosecution under

[5] A recent example of this principle is *Davies, Turner & Co., Ltd.* v. *Brodie* [1954] 1 W.L.R. 1364, from which it appears that *Carter* v. *Mace* [1949] 2 All E.R. 714 can now be supported only on its particular facts, as an instance of 'wilfully shutting the eyes.'

[6] [1942] 2 All E.R. 118.

the Theatres Act, 1843, which penalises any person who for hire shall act or present, or cause to be acted or presented, any new stage play, or any part thereof, until it has been allowed by the Lord Chamberlain. The defendant presented a licensed play, but, while he was away (having been called up for national service), unauthorised and unlicensed interpolations were made in it. It was held that the defendant had 'presented' these interpolations within the meaning of the Act, although he did not know of them and they were contrary to his instructions. The decision must, of course, be accepted as an interpretation of the particular section, though it does not seem to conform to the fundamental principles of interpretation of penal statutes. The construction was not necessary to effectuate the purpose of the section, which expressly threw responsibility on the actors themselves. It may also be observed that the judgment of Humphreys, J., leaves the precise scope of the decision obscure.

Another verb that has been held to let in vicarious responsibility is 'uses.' Since this is of frequent appearance in penal legislation it is worth examining the authorities in some detail. The earlier cases are somewhat vacillating. In *Strutt* v. *Clift*[7] the defendants were dairy farmers whose bailiff without their knowledge or authority used their van on a private jaunt. This was a non-trade use which was forbidden under revenue legislation because there was no carriage licence in respect of the van. The defendants were charged with keeping the van without a licence, and the question was whether they were within a statutory exemption on the ground that the van was 'used solely for the conveyance of goods in the course of trade.' It was held, by way of of purported application of the 'licensee' cases, that since the defendants kept the van, and since the user was by one whom they had placed in charge of the farm and the van, they could not bring themselves within the exemption and were accordingly guilty. The decision is not really within the authority of the licensee cases, because there was here no public licence conferring a regulated privilege. It can, however, be justified in the eyes of those wedded to the literal interpretation of statutes, because to exempt the defendants it would have been necessary to imply into it the words 'by the owner or with his knowledge or authority,' and this the court refused to do. Hence the decision

[7] [1911] 1 K.B. 1.

is not an instance of the extensive interpretation of a penal statute. Moreover, the court did not insist upon an absolutely literal interpretation against the citizen, because Coleridge, J., in his judgment made it clear that if a stranger had taken the van for a non-trade use without permission the defendants could not have been convicted. Notwithstanding such non-trade use by a stranger, the van would be 'used solely for the conveyance of goods in the course of trade.' Thus in interpreting the word 'used,' the court was not prepared to extend it to user by a stranger, but did extend it to user by a servant, even though wholly unauthorised. It may be said that even as so limited the decision is a questionable one, because on the facts the servant was acting wholly outside the course of his employment. In the law of tort, where vicarious responsibility is firmly established, a master would not be responsible for what his servant did in taking out a vehicle on an unauthorised private jaunt. With much less reason should there be criminal responsibility.

The next case, *Phelon & Moore Ltd.* v. *Keel*[8] goes the other way. The defendants, Phelon & Moore Ltd., were the manufacturers of motor cycles to whom a general identification mark (*i.e.,* a trade number plate) had been assigned under legislation now represented by the Road Vehicles (Registration and Licensing) Regulations, 1953, regulations 29 and 30, made under the Vehicles (Excise) Act, 1949, s. 17. One of their employees took out a motor cycle without their knowledge or authority and used it for his own private purposes with the trade plate. In respect of this unauthorised use the defendants naturally did not keep the record required by the legislation then in force. On a charge being brought for failing to keep the record, it was held that the defendants could not be convicted. The regulations said that the record had to be kept 'on every occasion on which the general identification mark is used.' Although the verb was in the passive, and although the defendants' omission fell literally within the terms of the offence, they could not be held responsible for the unauthorised act of their servant.

The judgments in this case purport to distinguish *Strutt* v. *Clift,* but the grounds of distinction are hardly intelligible. Avory, J., for example, regarded the earlier case as one of absolute liability; but this, although true, does not explain the distinction.

[8] [1914] 3 K.B. 165.

The question under consideration is not merely whether a defendant can be convicted although lacking *mens rea,* but whether he is guilty of the statutory *actus reus,* and the latter question depends on whether the court is prepared to require a use by the defendant personally or authorised by him, or whether the unauthorised use by a servant can be regarded as his own use. In *Strutt* v. *Clift* the court did not say that the legislation there considered covered user by absolutely any one; it was only held to cover use of the van by a servant. In other words, *Strutt* v. *Clift* was an instance of vicarious responsibility for servants. On principle, the question there decided was the same as that which arose for decision in *Phelon & Moore Ltd.* v. *Keel.* The only real difference was that in the earlier case the servant was left in charge by the defendants, whereas in the later he was not. This distinction between types of servant is taken in the licensee cases, which *Strutt* v. *Clift* purported to follow; but it is submitted that the very wide extension of responsibility in the licensee cases should not be applied where no public licence is involved. There might perhaps have been said to be a public licence in *Phelon & Moore Ltd.* v. *Keel* but there was none in *Strutt* v. *Clift.*

The pendulum swung again with *Griffiths* v. *Studebakers Ltd.*,[9] which was another case concerning the trade licence. A motor car belonging to the defendants, who were the holders of a limited trade licence in respect of it, was driven by one of their servants; and contrary to the express orders of the defendants there were more than two passengers in the car. This was a breach of the regulations. It was held that the defendants were responsible in law notwithstanding that they had taken all reasonable precautions to prevent the breach. They were, therefore, convicted of 'using' the car in contravention of the regulations.[10] This decision is from a technical point of view more defensible than that in *Strutt* v. *Clift,* for here the driver was on the company's business when he was driving the car. Accordingly, the facts fell within the concept of vicarious responsibility as it has been developed in the law of tort. Whether it was justifiable to extend that concept to the criminal law is another matter.

Recent cases make it quite clear that the verb 'use' is capable of the enlarged construction to cover vicarious responsibility. In

[9] [1924] 1 K.B. 102.
[10] See (1924) 93 L.J.K.B. 50.

Quality Dairies (York) Ltd. v. *Pedley,*[11] where a milk distributor's agent used an unclean vessel, it was held that the distributor was responsible as for 'using' it himself. The latest example is provided by *Green* v. *Burnett,* which was referred to at the beginning of this article. In that case the owners of the van (a limited company), who were the masters of the driver, were prosecuted as well as the driver. It was held, following dicta in the immediately preceding case of *James & Son Ltd.* v. *Smee,* that master as well as servant could be convicted of 'using' the van in its defective condition. Lord Goddard, C.J., based this on the fact that 'the regulations lay down an absolute prohibition against user in contravention thereof.' This is, of course, a partial reason for the decision, because if the regulations were not construed as creating strict responsibility the master could not be convicted in the absence of personal *mens rea.* However, it is not a full explanation, because it does not state why the master was held responsible for the act of his servant. It is submitted that it would be an erroneous reading of the learned Chief Justice's remark to suppose that every crime of absolute prohibition is to be taken as involving vicarious responsibility—though this wide principle was stated by Slade, J., in his minority judgment. He said: 'It is now well settled that if a servant, acting within the general scope of his employment, does an act which the law absolutely prohibits, the master (whether an individual or a company) is criminally responsible for that act even though he has expressly forbidden his servant to commit it.' With all respect, a crime of absolute prohibition merely means one in which the courts refuse to imply a requirement of *mens rea.* Such a refusal to require *mens rea* does not dispense with the need for finding that the defendant, the master, comes within the wording of the legislation. Obviously the latter question depends on the particular circumstances and the interpretation of the legislation. In *Green* v. *Burnett,* it was possible to find that the master came within the wording because the regulation contained the general word 'uses.' Parker, J., expressed the point in the preceding judgment in *James & Son Ltd.* v. *Smee* by saying: 'In common parlance a master is using his vehicle if it is being used by his servant on his business.' The court refused to hold that Parliament, by drawing a distinction between 'using'

[11] [1952] 1 All E.R. 380.

and 'causing or permitting' a use, had indicated an intention that the word 'use' should refer only to the immediate user.

If this is the true view of cases like *Green* v. *Burnett,* it seems that we are now to witness the compiling of a new 'judicial dictionary' which will distinguish between those verbs in respect of which the servant's conduct can be regarded as the master's, and those in which it cannot. We must take it as settled by authority that a sale or use or (perhaps) presentation of a play by a servant, if within the general scope of his authority (though forbidden in the precise circumstances), is a sale or use or presentation by the master. On the other hand it has been held that a representation made by the servant in the course of selling is not a representation by the master.[12] A servant's 'ill-treating' of an animal cannot be attributed to his master.[13] A receiving by a servant does not make his master guilty of 'receiving' stolen goods.[14] Although the point has not been expressly decided, it seems that a master could not be convicted of an offence of 'driving' a vehicle through his servant, for in law it is only the actual driver who drives.[15] So also a giving of credit by a servant is not a giving of credit by the master.[16]

To make the law more difficult still, the same verb may possibly be construed to create vicarious responsibility in a 'public welfare offence' but not in one of the traditional crimes. Thus when a servant is in *de facto* possession of a thing on behalf of his master, the possession may be attributed to the master for the purpose of a public welfare offence,[17] and yet not attributed to him for the purpose of the crime of receiving stolen goods. This way of reconciling the authorities may lead to the somewhat surprising conclusion that the presentation of an unlicensed stage play is a 'public welfare offence.'

To sum up, vicarious criminal responsibility depends upon a totally different mode of approach to statutes from strict responsibility. The latter is capable of resulting merely from literal interpretation, but the creation of responsibility for the act of another generally requires extensive interpretation in favour of

[12] *Roberts* v. *Woodward* (1890) 25 Q.B.D. 412.
[13] *Small* v. *Warr* (1882) 47 J.P. 20.
[14] *Pearson* (*No. 2*) (1908) 1 Cr.App.Rep. 79.
[15] Cf. *Maher* v. *G.N.R.* [1942] I.R. 215 at 220.
[16] *Wilson* v. *Murphy* [1937] 1 All E.R. 315; 53 T.L.R. 308.
[17] Cf. *Hawthorn* v. *Bartholomew* [1954] V.L.R. 28, noted in [1955] Crim.L.R. 296.

the prosecution, which is a reversal of the traditional attitude to penal statutes. The effect of the new tendency towards vicarious responsibility by the extensive interpretation of statutory verbs is likely to make the law extremely complex, as well as unpredictable in cases of first impression. Much will depend upon whether the particular judges who decide the case think vicarious criminal responsibility a good or bad thing.

It is hard to determine what judges really think is the policy of the matter, because, as with the question of *mens rea,* they tend to say one thing and do another. In *Gardner* v. *Akeroyd,*[18] Lord Goddard, C.J., characterised vicarious responsibility as 'odious,' but he said at the same time that it was a 'necessary doctrine for the proper enforcement of much modern legislation.' It seems strange that a judge should regard an unproved assumption of necessity as justifying something that is recognised to be odious, more particularly when it can hardly be said of any of the instances of criminal vicarious responsibility that Parliament has clearly inculpated the master.

An attempt to justify the law was made by Devlin, J., in *Reynolds* v. *G. H. Austin & Sons Ltd.*[19] He said: 'Although, in one sense, the citizen is being punished for the sins of others, it may be said that if he had been more alert to see that the law was observed, the sin might not have been committed. But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man to be the useless and unjust infliction of a penalty.' Admirable though this view may be, it does not explain the present law, for the courts look not to the question whether the defendant was at fault, but, apparently, to the particular verb used in the statute.

Perhaps one is merely being old-fashioned in lamenting the current tendency to impose indiscriminate criminal punishment. After all, it gives work to lawyers; and the punishment is only a fine, which the defendant can probably well afford, and which

[18] [1952] 2 Q.B. at 751.
[19] [1951] 2 K.B. 149.

goes to reduce the taxation of the rest of us; and, best of all, the practice of fining everybody without individual inquiry undoubtedly catches a few fish that would otherwise slip through the prosecution's net. In return for these advantages, there is merely a continuing affront to the ordinary sense of justice, a weakening of the moral sanctions of the criminal law, the undeserved humiliation of numbers of citizens, and the imposition of an arbitrary and cumbrous tax on the producers of wealth. The argument that strict liability is found only in trivial cases will not survive critical examination; and it must be remembered that few law cases are trivial to the ordinary citizen who is involved in them. Some of us know unfortunates with minds unhinged as a result of worrying over the real or fancied injustice of a case in which they were involved. There is exaggeration, but also for many people an element of truth, in Oscar Wilde's observation that 'all trials are trials for one's life, just as all sentences are sentences of death.'

RESPONSIBILITY FOR 'PERMITTING' OR 'CAUSING'

It is a relief to turn to a group of cases where the *mens rea* doctrine does not present its usual half-withered appearance, and where statutes are given a construction favourable to the morally-innocent defendant.

Despite some vacillation, the tendency of modern decisions is to hold that a statutory offence of 'permitting' cannot be committed without *mens rea.* The defendant must either have known that the act was being done or have wilfully shut his eyes to it. This rule was recently reaffirmed in *James & Son Ltd.* v. *Smee,* above, where it was applied to a charge against a company of permitting an unauthorised use under the Motor Vehicles (Construction and Use) Regulations, 1951, regulation 101; 'a permission to use is not, unless more is proved, a permission to use in contravention.' [20]

The same rule will generally be applied to statutory offences of 'causing.' In *Lovelace* v. *D.P.P.*[1] the facts were somewhat similar to *Grade* v. *D.P.P.,* above, p. 63, except that the prosecution was brought not against the producer of the play but against the manager and licensee of the theatre, and he was charged not

[20] [1955] 1 Q.B. at 92.
[1] [1954] 1 W.L.R. 1468.

with presenting the play but with causing it to be presented. It was held that he could not be convicted of a statutory offence of 'causing' in the absence of knowledge of the facts.

The rule requiring proof of *mens rea* on a charge of permitting or causing applies even where the immediate perpetrator is the defendant's servant. To the older authorities on this point[2] we must now add *James & Son Ltd.* v. *Smee,* above ('causing or permitting'). The 'licensee' cases, however, constitute an exception.

It must be admitted that the effect of the rule is somewhat technical where, as in *James & Son Ltd.* v. *Smee* and *Green* v. *Burnett,* the legislation combines a reference to 'causing or permitting' with a reference to 'using.' The master can be convicted of 'using' the thing in respect of the servant's use, but not (without knowledge) of 'causing or permitting' the servant's use. What seems to have happened is that the courts, having interpreted the words 'causes or permits' in a sense adverse to the prosecution by annexing to them a requirement of *mens rea,* have more than balanced matters by interpreting the word 'uses' against the defendant, holding it to create both strict and vicarious responsibility. This leaves us with a rule of construction which must be remembered by prosecutors in drawing summonses but which does not protect a morally-innocent defendant from conviction if the summons is carefully drawn.

It is submitted that, as applied to facts like those in *Green* v. *Burnett,* the one rule gives a result that is excessively lenient, while the other gives one that is excessively strict. In *Green* v. *Burnett* the failure of the brakes was due to a defect contained within the casting of the master cylinder, which could have been discovered only by dismantling the cylinder. There was no evidence that, in the absence of knowledge of a defect in the brakes, it was negligent not to have the cylinder dismantled. It seems clear, therefore, that the master was not in any way at fault. Had there been evidence of failure to maintain the van properly, it would clearly be desirable to convict the master, in order to secure safety on the roads, and to this extent the judicial construction of the offence of 'causing or permitting,' which

[2] *Harrison* v. *Leaper* (1862) 5 L.T. 640 ('causing'); *Handley* (1864) 9 L.T. 827 ('allowing'); *Massey* v. *Morris* [1894] 2 Q.B. 412 ('allowing'); and *Greenwood* v. *Backhouse* (1902) 86 L.T. 566 ('causing').

requires actual knowledge, gives in the particular case a socially undesirable result. (But the blame for that might justifiably be put on the legislature, for not making it clear in penal legislation that the master was intended to be under a duty of care.) On the other hand, when the master was not negligent, there appears to be no social purpose served in convicting him of the offence of 'using.' Such a conviction could not, in the future, give the master X-ray eyesight into the interior of the cylinder casting.

Apart from the licensee cases, there is, according to the strong weight of authority, only one proviso to the rule that an offence of permitting or causing requires knowledge. This is in respect of wilful blindness, which is taken as equivalent to knowledge. A person is guilty of wilful blindness if he has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance. Mere inadvertent negligence is not enough. As Devlin, J., said in *Roper* v. *Taylor's etc. Ltd.*,[3] 'The case of merely neglecting to make inquiries is not knowledge at all—it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law.' An illustration from a slightly different department of law is *Callow* v. *Tillstone*,[4] where it was held that a person could not be convicted as abettor where he did not know but ought to have known of the conduct of the perpetrator.

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

It is submitted that *Davies, Turner & Co., Ltd.* v. *Brodie*,

[3] (1951) 2 T.L.R. 284.
[4] (1900) 83 L.T. 411.

mentioned in note 5 above, is not against this restricted view of wilful blindness. The case turned on the rule that a person cannot be convicted as secondary party in the absence of knowledge. Although Ormerod, J., said that the defendant there before the court had taken reasonable precautions, this (it seems) was only for the purpose of emphasising that he had not wilfully shut his eyes; and Lord Goddard, C.J., expressly said that good faith was a defence. However, some remarks in *James & Son Ltd.* v. *Smee* [5] are more difficult to reconcile with the restricted definition. The court was there concerned to distinguish the earlier case of *Browning* v. *J.W.H. Watson (Rochester) Ltd.*,[6] and it did so by saying that in *Browning's Case* there was a failure to take precautions. Since *Browning's Case* was a charge of 'permitting,' it required proof of knowledge of the conduct in question; hence a mere failure to take precautions to prevent the conduct, amounting to inadvertent negligence, should not have been regarded as sufficient. It is submitted that the only view consistent with the other authorities is that *Browning's* was wrongly decided on the question of 'permitting.'

Another example of the tendency to disregard the limited meaning of wilful blindness is *Jones* v. *Richards*.[7] In that case a farmer did not know of the existence of a statute imposing upon him the duty of not permitting a machine (which was being worked for him by independent contractors) to be securely fenced. Consequently he made no inquiry whether it was properly fenced or not, and in fact it was not. Barry, J., held that the farmer must be deemed to know the law, and that as he had the means of knowledge of the facts he must be deemed to have had knowledge. This decision is inconsistent with other cases which refuse to apply the doctrine of ignorance of law in such a way as to bring about a constructive knowledge of facts. It is also inconsistent with the principle that an offence of permitting cannot be committed by carelessness.[8]

According to *Reynolds* v. *G.H. Austin & Sons Ltd.*,[9] the word 'permits' in a statute may colour the neighbouring word 'uses.'

[5] [1955] 1 Q.B. at 71.
[6] [1953] 1 W.L.R. 1172.
[7] [1955] 1 W.L.R. 444 at 456–457.
[8] See generally Williams, *Criminal Law: The General Part*, § 41 (*b*) (*c*) (*d*) (*e*).
[9] [1951] 2 K.B. 135.

The charge was under the Road Traffic Act, 1930, s. 72 (10), where the legislature dealt in the same breath with 'using' the vehicle and 'causing or permitting' it to be used, and it was held that inasmuch as there had to be guilty knowledge in the last two cases, there had to be guilty knowledge also on a charge of 'using.' However, the effect of the decision was cut down in *James & Son Ltd.* v. *Smee,* above, where it was held that this part of the decision in *Reynolds Case* applied only where the offence was one in respect of acts by persons who were not the defendant's servants. Where the offence of using relates to use by the defendant's servant, the word 'uses' is not coloured by the word 'permits.' The decision in this case appears to proceed upon the fiction that a master can always control his servant, and it introduces a refinement into the decision in *Reynold's Case* which was hardly expected.

It will be remembered that in *Lovelace* v. *D.P.P.* (above, p. 70) the licensee of a theatre was acquitted of causing to be presented a play which departed from the script licensed by the Lord Chamberlain, because he did not authorise the departure. The court left open the question whether on the same facts the licensee of the theatre could have been convicted of 'presenting' the play. One point that might have to be considered on such a charge is whether in the particular case the licensee of the theatre is the employer of the actors. If he is not, the case may well be held to fall within the doctrine of *Reynolds* v. *G. H. Austin & Sons Ltd.* This is because the Theatres Act, 1843, s. 15, covers those who 'for hire shall act or present, or cause to be acted or presented,' an unauthorised play. Since the word 'cause' requires proof of *mens rea,* it may well be held, following *Reynold's Case,* that the words 'act or present' also require it—except, now, in relation to an offence by servants. This is yet another illustration of the way in which doctrines of strict and vicarious responsibility make the criminal law technical and uncertain.

5

OBSCENITY AND THE LAW

DENNIS LLOYD

IN July, 1954, the magistrates at Swindon had before them, on a summons under the Obscene Publications Act, 1857, some 261 books seized from a local shop. The character of some at least of these works was sufficiently indicated by such specimen titles as *Corpse in the Boudoir, Dames Try Too,* and *Foolish Virgin says 'No.'* Amongst these works, whose destruction was sought, was a somewhat better-known piece of fiction, a translation of *The Decameron of Boccacio,* in two volumes and priced at three guineas. The magistrates condemned to destruction sixty-five of the books thus seized, including not only the works whose titles I have given, but also *The Decameron.*[1] An appeal, however, was launched solely in regard to *The Decameron* and the order of the magistrates was subsequently reversed by the Appeal Committee of Quarter Sessions.[2]

Despite the natural tendency of the modern and enlightened critic to ridicule the order of the Swindon Bench which condemned to destruction a classic of literature of some 600 years' standing, it must be understood that in the present state of our law the problem which faced those magistrates was not an easy one. For if all frank description of sexual activities (save perhaps in serious medical or psychological treatises) is to be regarded as potentially corrupting, it is not at first sight at any rate apparent why the fact that such a description appears in an established classic as opposed to a modern novel is to confer an automatic charter of immunity. Mr. A. P. Herbert once worked out the *reductio ad absurdum* of this situation in one of his *Misleading Cases* by representing the hearing of a summons under the

[1] See *The Times,* July 30, 1954. For an interesting discussion on the subject-matter of this paper the reader is referred to Ernst and Seagle, *To the Pure . . .* (1928). See also D. H. Lawrence, *Sex Literature and Censorship* (1955), especially the introductory essays by H. T. Moore and H. F. Rubinstein and Lawrence's own essay, '*Pornography and Obscenity,*' at pp. 195–222.

[2] *The Times,* September 16, 1954.

Obscene Publications Act of 1857 served on the Head Master of Eton to show cause why the Greek and Latin classics in the original and in the translations seized on the school premises should not be destroyed.[3] The considered judgment of the Bench ordering the destruction of the whole of the works seized, is nonetheless worthy of study, despite its fictitious character, in the present state of our law. 'I am glad to say [the Chairman is reported as remarking] that no one on this Bench has had a classical education, and we were therefore able to approach these volumes with an open mind.' Finding that the works were of a corrupting tendency, especially if liable to fall into the hands of the young, the Chairman went on: 'In the present case the publications complained of have been deliberately purchased and kept for the consumption of young persons, and young persons drawn exclusively from the aristocracy and governing classes. . . . We have read with particular repugnance the record of the alleged god, Zeus, whose habit it was to assume the shape of swans, bulls and other animals, and, thus disguised, to force his unwelcome attentions upon defenceless females of good character.' The Chairman then proceeded to analyse some of the more revolting of the subjects of classic mythology, including the stories of Oedipus and Medea. 'No moral reproof is founded on these stories . . . and all through these legends there runs a strain of violence and cruelty and bloodthirsty vengeance which is as harmful to the reader as the strain of irregular passion.' In voicing their condemnation of the works before them the Bench concluded by recommending to the proper authorities a thorough survey of the whole body of classical literature read and studied in our schools.

It is, of course, no answer to say that once transformed into classic shape a book loses its erotic character. The young will turn over even the pages of the Bible in their search for what they judge to be 'smut,' as the existence of expurgated editions sufficiently testifies. Indeed, even at the present day some prudish publishers will not permit the translation into the vulgar tongue of passages of the classics regarded as too frank. This treatment is meted out for instance to one of the most daring (and entertaining) tales in *The Decameron—Il diavolo in Inferno*—which

[3] See *Uncommon Law* (1935), p. 164.

in one well-known English series is published only in the original Italian. Another famous series of the Greek and Roman classics, containing the original texts with an English translation alongside, decently veils some of the shadier Greek passages by a translation into Latin—for whose benefit I have never quite understood. It appears at any rate to be accepted that indecency in foreign languages is far less corrupting than in the vulgar tongue,[4] though the tendency to depravity may be no less marked among those acquainted with other tongues, ancient or modern, than among those whose knowledge is confined to English. Recently, and happily, so far as I am aware, without complaint, a new and excellent translation of Rabelais has been put before the public by Penguin Books at a very modest price. This edition, very rightly, we may think, makes no attempt to disguise the bawdiness of the language but faithfully translates it into contemporary English. A reviewer in *The Times*[5] points out that Rabelais is obscene rather than erotic and somewhat curiously explains the Victorian taste for this author on that account. 'He is (we are assured) sometimes an obscene but never an erotically disturbing writer. His jokes are of a kind that Victorian society could tolerate, after the ladies had departed, along with the circulation of the port. . . . Modern readers [this critic adds, perhaps with justice], if they like either, probably prefer erotic literature to coarse literature.' Be this as it may, the law in principle equally condemns both, at any rate if not sanctified by age, though probably it is at the present day more hostile to the erotic than the coarse. In this connection even serious medical publications may run the risk of condemnation; only recently in Doncaster the police sought the destruction (though unsuccessfully) of copies of the *Kinsey Reports* on male and female sexual behaviour,[6] and the fate for many years of the epoch-making works of Havelock Ellis is too well-known to require repetition.[7]

[4] In the preface to his recent translation of Montaigne's *Essays* (1946), Mr. Trechmann writes: 'For entire suppression something might be said; but to publish the outspoken passages in their original is like hiding a thing behind a curtain that may be easily drawn aside. The curiosity aroused by this mystification is the greater, and one expects something more than the reality' (p. xv).

[5] March 25, 1955.

[6] See *The Times*, March 20, 1955.

[7] Cf. Ernst and Seagle, pp. 58, 299.

DEVELOPMENT OF THE LAW

The foundations of our law of obscenity were, perhaps unfortunately though hardly surprisingly, laid in the mid-Victorian era. As we all know, that was a period of exceptional prudishness in English history, when sex or anything to do with it was practically unmentionable in decent society, and when even the legs of tables and pianos were draped in muslin frills in the interests of propriety.[8] We may perhaps gauge the tone of that epoch from the advice given in a book of etiquette published in 1863 to the effect that the perfect hostess should ensure that the works of male and female authors were segregated on her bookshelves, unless of course the authors in question happened to be married.[9] Up till near the end of the eighteenth century English literature from Chaucer down to Sterne and Smollett contained a continuous vein of coarseness, which was at least the equal of any foreign bawdiness. Although puritanical attacks on the theatre had resulted in the freedom (or licence) once possessed by the Restoration playwrights, such as Congreve and Wycherley, being severely curtailed,[10] there was no censorship of written publications nor were they regarded as indictable for immorality as opposed to blasphemy or impiety.[11] During the course of the eighteenth century, perhaps as a result of the gradual refinement of manners, both public opinion and the judges became more hostile to lewd literature,[12] and by 1802, when the English Society for the Suppression of Vice was founded, it was generally recognised that it was a crime at common law to sell obscene literature.[13] During the early part of the nineteenth century prosecutions were generally confined to cases of the crudest type of pornographic publication,[14] the common law being supple-

[8] Although this is the orthodox view of Victorian society, it is perhaps in need of some considerable qualification, in the light of such facts as are revealed in Mr. Cyril Pearl's recently published book, *The Girl with the Swansdown Seat* (1955).

[9] Cited by Mr. Lionel Hale in the *News Chronicle,* March 6, 1954.

[10] The official censorship of stage plays dates from the Licensing Act, 1737.

[11] See *R.* v. *Read* (1708) Fort. 98.

[12] The earliest case seems to have been *R.* v. *Curl* (1727) 2 Str. 788, in which it was laid down that a work was indictable if it tended to the destruction of morality in general.

[13] See Ernst and Seagle, pp. 122–125. But some of the early prosecutions were probably launched more as political campaigns than in order to purify morals (see *e.g., R.* v. *Wilkes* (1770) 4 Burr. 2527).

[14] *ibid.* At this date too, some cases were clearly aimed rather at suppressing views considered politically dangerous (see *e.g., Southey* v. *Sherwood* (1817) 2 Mer. 435).

mented by the provisions of the Vagrancy Act of 1824, which made it an offence to expose obscene publications in the highway or any place of public resort.

Then in 1857 came the Act which like so many others of that period bears the name of Lord Campbell, the Obscene Publications Act. It is interesting to note that when the Bill was debated in the House of Lords it was severely attacked by several eminent peers as being far too widely drawn and therefore as being capable of becoming an instrument for repressing genuine works of literature. The attack was led by Lord Brougham and Lord Lyndhurst. 'How do you propose [asked Lord Brougham] to define what is an 'obscene' publication? . . . In the works of some of our most eminent poets there are some objectionable passages which, under this measure, might cause them to be considered obscene publications.' In answer, Lord Campbell soothed the opposition by assuring the House that the measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well-regulated mind.[15]

The Act as passed empowers justices to authorise the seizure of any publication believed to be obscene and being kept for sale or distribution for the purposes of gain; the occupier of the premises must then be summoned to show cause why the publication should not be destroyed, whereupon such occupier or any person claiming to be owner of the publications may appear before the magistrates, and if they are satisfied that the work is obscene then they must order its destruction.[16] No definition of obscenity was contained in the Act, and it therefore fell to Cockburn, C.J., some ten years later, in 1868, to give a judicial interpretation to the scope of the Act. This he proceeded to do in the case of *Hicklin*,[17] a decision of very far-reaching importance, as the test of obscenity there laid down has been since treated as authoritative by the courts of all the common law countries not excluding, until fairly recently, the United States.[18]

15 'Pornography had become a thriving British industry . . . Holywell Street . . . was the centre of this unwholesome and unholy trade' (C. Pearl, *op. cit.*, pp. 251–252).

16 Section 1.

17 (1868) L.R. 3 Q.B. 360.

18 Certain American judges began to depart from the *Hicklin* approach, as a result of the *Hagar Revelly Case* in 1915, and this development cul-

The subject-matter of the case was an anti-papistical pamphlet which aimed at exposing the practices of the confessional. The pamphlet was entitled, *The Confessional Unmasked, Showing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession.* It was admitted that the motive of the work was an honest, if misguided, attempt to attack the Roman Catholic Church. Nevertheless the pamphlet contained many immoral passages. Was it obscene within the meaning of the 1857 Act? The Chief Justice then proceeded to enunciate his famous test: 'I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.'[19] Applying this test the pamphlet was duly assigned to destruction. Few would regret the loss of this particular effusion; the effect of the decision, however, went far beyond the individual instance.

It will be noted that Cockburn, C.J.'s dictum abandoned, within a decade of its being enunciated, the view propounded by his predecessor Lord Campbell, the sponsor of the Act, that it was aimed only at works *written for the sole purpose* of corrupting the morals of youth. On the contrary a purely objective standard was applied, namely the actual tendency of the work. Moreover, the Chief Justice did not apply that standard to the normal reasonable man or woman or even child, but to those whose minds are already open to immoral influences. Taken literally this would mean that all our literature is, as one newspaper has put it,[20] to stand or fall by its possible effect on 'the immature, the abnormal and the nasty minded.' In the result an instrument has been forged which bludgeon-like can be, and has in fact been, and is still sometimes used to strike down indiscriminately not only the worst class of crude pornography but also serious works of literature such as the novels of Zola,

minated in the *Ulysses Case* referred to below (see Ernst and Seagle, pp. 204–205; M. Ernst, *The Best is Yet* (1945), pp. 110–111; (1954) 38 Minn. L.R. 295). For a recent Canadian view, see (1954) 32 *Canadian Bar Review,* p. 1010; but cf. (1954) 33 *Canadian Bar Review,* p. 132.

[19] At p. 371.

[20] *Evening Standard,* June 19, 1954.

Theodore Dreiser, Radclyffe Hall, D. H. Lawrence[1] and James Joyce, as well as serious works on the psychology of sex or contraception.[2] Nor indeed, as we have seen, are even the classical works of literature immune from the purifying urge of a local police inspector or Bench of magistrates. Such a tendency is certainly not confined to this country for only this year the United States' Post Office[3] sought to procure the destruction of a translation of the *Lysistrata* of Aristophanes as being 'plainly lewd, obscene and lascivious.'[4] The history of the operation of the obscenity laws in this country during the last forty years or so has been a curious one of sudden spurts of activity by the authorities followed by periods of relative quiescence. During 1954 the 'heat' was suddenly turned on again after several years of deceptive tranquillity, with the result that eminent and reputable publishers have found themselves in the dock in the company of purveyors of the crudest grade of pornography. This sudden outbreak has, while exerting some restraint on purveyors of pure pornography for whom no sympathy will be felt, acted for a time at any rate as a serious curb on the production of genuine writing, and has created a pardonable sense of timidity on the part of publishers and even printers who have been known to refuse to print works which they find contain doubtful passages.

The courts have also (save in one conspicuous recent instance

[1] For an interesting (and disquieting) account of the continuous war waged on D. H. Lawrence's works by the authorities, see the introductory essay of H. T. Moore in the work referred to *supra,* note 1, p. 75. Even today no reputable publisher in the Anglo-Saxon world would risk putting a complete text of *Lady Chatterley's Lover* before the public. There has in fact recently been a successful prosecution in London for publishing this work. The publisher was sentenced to two months' imprisonment which was replaced by a £50 fine on appeal: see *News Chronicle,* January 5, 1956.

[2] A book may also be deprived of copyright protection if it is held to be immoral, and here again a very severe standard has been occasionally imposed: see *Glyn* v. *Western Feature Film Co.* [1916] 1 Ch. 261, where Elinor Glyn's novel *Three Weeks* was held to be without protection on this ground as containing a 'glittering record of adulterous sensuality masquerading as superior virtue' (at p. 270, *per* Younger, J.). How many contemporary novels would survive that standard? Pirated copies of such works as *Lady Chatterley's Lover* have flourished under this dispensation (see D. H. Lawrence, *Sex, Literature and Censorship* (1955), pp. 223–225).

[3] Which still seems to apply standards different from those recognised in the *Ulysses Case.*

[4] See *The Times,* March 7, 1955. What the outcome (if any) of this affair has been, seems not to have been reported in the English press, or if it has, the report has escaped me.

to which I will refer more fully in a moment) rigidly adhered to the letter of the *Hicklin Case* in such a way as to restrict very narrowly the scope of the defence on an issue of obscenity. As it is purely a question for the magistrates (or the jury on a prosecution by indictment) whether the work is obscene, no evidence can be adduced as to contemporary, literary or other standards, and no expert witnesses can be called as to the literary merit of the work, or what may or may not be regarded as tending to corruption or depravity.[5] Nor is the prosecution bound to designate any particular passages as being complained of as obscene.[6] Evidence of the purpose of the publication or the honesty or bona fides of author or publisher are equally irrelevant to conviction (though not to the punishment to be inflicted). Indeed the proceedings in substance consist of little more than the magistrates or jury retiring in private to read the books[7] and then hearing any speeches by the defence, which must be confined to argument as to the corrupting tendency of the particular books in question.

Moreover, the operation of the 1857 Act reveals some curious anomalies. An order for destruction operates only as regards the particular copies seized, so that we have the strange situation (as has arisen in several recent instances) of the same book being condemned by some Benches and exonerated by others. Nor has either the author or the publisher any right to appear, or indeed to be notified of the proceedings, and the first that either may hear of the condemnation of a book which he has published or written is by a report in the press that its destruction has been ordered.[8] It does seem a little hard that a serious publisher or writer may

[5] *R.* v. *Reiter* [1954] 1 All E.R. 741. This had previously been stated to be the law by the Chief Magistrate at Bow Street (Sir Chartres Biron) in 1928, in the *Well of Loneliness Case.*

[6] *Thomson* v. *Chain Libraries Ltd.* [1954] 2 All E.R. 616.

[7] It is sufficient even if they have only read the book prior to the proceedings provided they have considered them sufficiently to form a view: *Thomson* v. *Chain Libraries Ltd.*, *l.c.* above, n. 6, at p. 618. Although a book must be judged as a whole (*R.* v. *Martin Secker Warburg Ltd.* [1954] 2 All E.R. 683) it may be condemned on the basis of the obscenity of a single passage (*Paget Publications Ltd.* v. *Watson* [1952] 1 All E.R. 1256).

[8] When this occurred to D. H. Lawrence, on the seizure of his book *The Rainbow* in 1915, to a question asked in the House of Commons, Sir John Simon, the then Home Secretary, gave the rather odd reply that it should be possible 'if the author thinks he was wrongly treated, for another copy to be seized by arrangement, in order that he might defend the book.' See H. T. Moore, *op. cit.*, at p. 9.

thus find himself stigmatised as a pornographer without being afforded any opportunity to be heard in his defence.

RECENT DEVELOPMENTS

There have, however, been two rather more encouraging developments, at least for those who feel that literature ought to be allowed to develop freely and that a book is not necessarily to be judged by its possible effect on children of school age. As Sir Stanley Unwin has pointed out, the *Hicklin* test leaves 'the publisher to demonstrate in effect that all his publications are suitable for innocent schoolgirls. Some of us [he adds] publish for adults.'[9] The first of these developments was the decision of Judge Woolsey in the United States District Court in 1933, holding that the novel *Ulysses* by James Joyce was not obscene or subject to destruction. The second was the recent charge to the jury at the Central Criminal Court by Stable, J., in *R.* v. *Martin Secker Warburg Ltd.*[10] I will say a word about each of these cases.

The *Ulysses Case* marked a substantial departure from the approach laid down in *Hicklin,* and the judgment of Judge Woolsey deserves close attention.[11] The judge first satisfied himself that the book was not pornographic, that is, written for the purpose of exploiting obscenity. On the contrary, the conclusion was reached that the book was a sincere and honest attempt to fulfil the author's artistic objective of showing by his original literary technique, exactly how the minds of his characters operated. For this purpose the use of 'dirty' words formed an essential part of the true presentation of the sexual side of the lives of the characters. In an often repeated phrase, Judge Woolsey declared that although the book contained many words usually considered dirty, he had found nothing that he considered to be 'dirt for dirt's sake.'[12] Having thus satisfied himself as to the absence of pornographic intent, the judge then went on to point out that he still had to consider the effect of the

[9] *The Truth about Publishing* (1926), p. 94.

[10] [1954] 2 All E.R. 683.

[11] The judgment is given in full in the edition of *Ulysses* published by Bodley Head (1936). The date of the judgment was December 6, 1933. It was upheld on appeal to the U.S. Circuit Court of Appeals. The test applied in that Court was: Does the book tend to promote lust?

[12] Cf. D. H. Lawrence, 'Pornography is the attempt to insult sex, to do dirt on it' (*op. cit.,* p. 203).

book from an objective standard, irrespective of intent. For this purpose he adopted the test of obscenity as something tending to stir the sexual impulses, or to lead to sexually impure and lustful thoughts. This test, however, he continued, had to be applied in relation to the person with average sex instincts—*l'homme moyen sensuel*—as he is called in French. To assist him in arriving at a conclusion as to this, the judge consulted privately two friends of his whose opinions on literature and life generally he valued highly and to each of whom he gave the legal test of obscenity and then asked their view as to whether *Ulysses* fell within that test. Both were of opinion that it did not. Thus supported by this view of two normal and informed persons, Judge Woolsey reached the considered conclusion that whilst in places the effect of *Ulysses* on the reader might be 'emetic it was not an aphrodisiac' and that it could therefore be admitted into the United States.

It may be noted that the American courts, even before the *Ulysses Case,* had shown themselves ready to receive the opinions of experts as to the merits of the work in question and Mr. Morris Ernst, who was defending counsel in the *Ulysses Case* as well as in many other similar proceedings, tells a charming story which arises out of this practice. In defending a work of Arthur Schnitzler, called *Casanova's Homecoming,* Mr. Ernst prayed in aid the opinions of a number of eminent literary figures. The judge reserved judgment and after a few weeks called up Mr. Ernst's office and said he did not find any testimonial from Heywood Broun. Within a few hours a favourable statement signed by this gentleman was in the hands of the judge and shortly after the decision was given acquitting the publishers. It was only subsequently that Mr. Ernst learnt from the judge himself that the rather surprising request for an additional testimonial signed by Broun was because the judge's son was an autograph collector.[13]

The *Ulysses Case* displayed a welcome change in favour of upholding the freedom of literature in the United States, and had important consequences both in that country and beyond its borders. In England we have also had more recently an attempt by one of our judges to liberalise the law within the framework of the *Hicklin* judgment. In *R.* v. *Martin Secker*

[13] See M. Ernst, *The Best is Yet* (1945), pp. 117–118.

Warburg Ltd.,[14] in 1954, the publishers were prosecuted for publishing a novel which dealt with contemporary life in New York and which dwelt largely on relationships between the sexes. The direction to the jury by Stable, J., is of outstanding interest and was received as something like a breath of fresh air in the publishing and literary world as well as among liberal-minded persons generally, though it of course gave no aid or comfort to any would-be purveyors of mere pornography. Time will only permit me to refer to a very few passages from the charge of the learned judge.

Stable, J., first emphasised to the jury that the *Hicklin* judgment was to be applied not in relation to the standards existing in 1868 but by present-day standards, and taking into account the changed attitude towards sex which now prevails.[15] Starting from the fact that sex is a matter which is admittedly of absorbing interest to human beings, the judge pointed out that there were two extreme approaches, one which regarded sex as a sin and a wholly distasteful subject and that it was therefore better to cover it up and pretend it did not exist; the other, that only mischief could result from secrecy and concealment and therefore the proper attitude was one of complete frankness and plain speaking. Somewhere between these two poles, said Stable, J., the average, decent, well-meaning man or woman took his or her stand.

Turning then to the standard by which the tendency to corrupt was to be judged the learned judge used these words: 'Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even farther back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is, of course not. A mass of literature, great literature from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean

[14] [1954] 2 All E.R. 683.

[15] In *R.* v. *Reiter*, at the Central Criminal Court, the Recorder, Sir Gerald Dodson, stated that if it was said that an obscene publication was to be judged in the light of modern standards he profoundly disagreed (see *The Times*, January 20, 1954). In dismissing the appeal, Lord Goddard, C.J., contented himself with saying that the law was the same as it was in 1868, without dealing specifically with the question of changed standards since that date (see [1954] 1 All E.R. 741 at 742).

that a publisher is guilty of a criminal offence for making these works available to the general public.' [16]

Stable, J., then pointed out that the novel sought to present, admittedly in crude terms, the lives of people living today in New York, and that the jury should consider how far the author was seeking to present a fair picture of contemporary American life. 'If we are going to read novels about how things go on in New York, it would not be of much assistance, if we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes. . . . You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature?' [17] The learned judge (re-echoing the words of Woolsey, J.) then invited the jury to consider whether there was anything in this book that was 'just filth for filth's sake.' [18]

In the light of this direction the jury returned a verdict of 'not guilty.'

I have so far dwelt on the excessive scope that has frequently been given to the conception of obscenity since the *Hicklin* judgment. From another point of view, however, that conception may be too limited. The idea of obscenity seems to be confined to sexual matters. Dr. Johnson, for example, defined it as: 'Immodest, not agreeable to chastity of mind, causing lewd ideas.' [19] Perhaps due to the upheavals resulting from two world wars and the consequent crumbling of social and moral standards, an obsession with violence and cruelty has grown up which has provided an even more profitable field of exploitation than unadorned pornography. We have long been familiar with gangster films but these have for many years been subject to a measure of supervision and control. A form of novel is, however, now cultivated which seeks to exploit brutality for brutality's sake and which glamorises sadistic violence. More disturbing still has been the growth of the so-called 'horror comics' which specialise

[16] [1954] 2 All E.R., at p. 686. Despite this, the Recorder of London in the later case of *R.* v. *Hutchinson & Co., Ltd.*, invited the jury to apply the standard of the 'callow youth or girl just budding into womanhood' (see *The Times,* September 18, 1954).

[17] At p. 687.

[18] At p. 687.

[19] The *Shorter Oxford Dictionary* definition is similar.

in purveying this type of sadistic and gloating brutality in the form of strip cartoons for the benefit both of the young and of mentally-arrested adults with a taste for this form of reading-matter. It is said that about ninety million copies a week are circulated in the United States, principally to children and adolescents between the ages of eight and sixteen.[20] The appearance of similar publications in this country has recently led to an outcry for their suppression. Few would regret such a step though here again it must be borne in mind that care has to be taken not to frame the ban too widely. Take for instance the following passage :

> '"Nail that guy," somebody yelled and Richard Gordon saw a fist hit a face that showed close to him. The man who was hit was pulled away from the bar by two others. In the clear, one man hit him again, hard, in the face, and the other hit him in the body. He went down on the cement floor and covered his head with his arms and one of the men kicked him in the small of the back. One of the men jerked him to his feet and pushed him up against the wall. "Cool the son-of-a-bitch," he said, and as the man sprawled, white-faced against the wall, the second man set himself, knees slightly bent, and then swung up at him with a right fist that came from down near the cement floor and landed on the side of the white-faced man's jaw. He fell forward on his knees and then rolled slowly over, his head in a little pool of blood. The two other men left him there and came back to the bar.
>
> '"Boy, you can hit," said one . . .
>
> '"When I hit him just then I felt his jaw go just like a bag of marbles," the other said happily.'

That is a not untypical quotation from *To Have or To Have Not*,[1] by Ernest Hemingway, who was awarded the Nobel Prize for Literature in 1954. Hemingway, and those who follow him, rightly regard crude violence as just as essential a part of the contemporary scene as sex, and seek to give it effective literary expression. This is, of course, entirely legitimate but it only emphasises the need for intelligent discrimination between

[20] See the *Economist*, October 30, 1954, p. 369.
[1] (1939) Part 3, Chap. 14.

genuine literary treatment and the mere exploitation of brutality for the purposes of gain.

Despite pressure from many responsible quarters the Government decided to deal piecemeal with the problem of horror comics rather than use the opportunity for the broad reform of the law of obscenity. Hence we now have on the statute book the Children & Young Persons (Harmful Publications) Act of 1955. This Act is framed in fairly narrow terms, being limited only to books, magazines, or other like works which are of a kind likely to fall into the hands of children or young persons, and consist wholly or mainly of stories told in pictures (with or without the addition of reading-matter), being stories portraying the commission of crimes, or acts of violence or cruelty, or incidents of a repulsive or horrible nature, such that the work would tend to corrupt a child or young person into whose hands it might fall.[2] There is, therefore, no danger of this Act being used to repress the works of the Hemingway literary school; nor, indeed, do its provisions extend to any gangster or similar novels which exult over brutality, though without possessing any pretentions to being literature.

SUGGESTIONS FOR REFORM

So much then for the law as it now stands. Now I must say something about suggestions for its reform. As we all know there has fairly recently been a new drive against books and other publications alleged to be obscene. Not even the picture postcards familiar to us from our youth and especially favoured by seaside visitors have altogether escaped the ban. In this connection, however, I must say that on a recent visit to the seaside myself I took the opportunity of looking at some of these cards and I confess that I was rather surprised to find just how far some of them go. I should doubt very much, however—although some, if not all, of these cards are plainly obscene in the ordinary sense—whether any recipient of such a card has ever been corrupted by it and the police seem, once again, to have arrived at the same conclusion and decided to leave their distributors unmolested.

This new purge, however, extending as it has done to a

[2] Section 1. This provision thus adopts the *Hicklin* test, which however is perhaps less objectionable in this specific and limited context.

number of reputable publishers and authors, has caused a good deal of dismay in publishing and literary circles. In an effort to stimulate reform of the law, the Society of Authors appointed a committee to make recommendations to that end. The committee was an almost entirely literary one, comprising well-known writers, publishers, printers and literary agents and other persons connected with the literary world. Its chairman was originally Sir Alan Herbert, who was later succeeded by Sir Gerald Barry. The recommendations of the committee were expressed in the form of a draft bill [3] the main lines of which have received wide support from many responsible quarters, including the *Times* newspaper.[4] This draft bill was submitted to the Home Secretary, but as I have already said, the Government preferred, for the time being at least, to tackle the immediate problem of horror comics separately, without dealing with the wider implications of the law of obscenity.

The main feature of the draft bill sponsored by the Society of Authors is its attempt to set forth the matters which are to be treated as relevant in deciding whether any particular work is obscene. The bill seeks to repeal the whole of the existing law on the subject and to substitute for it certain new offences.[5] The principal offence is the distribution, circulation, sale or offer for sale of any obscene matter.[6] No attempt is made to define the word 'obscene,' though it is stated to include any matter, whether or not related to any sexual context, which unduly exploits horror, cruelty or violence, whether pictorially or otherwise.[7] However, the bill lays down that in deciding whether any matter is obscene, regard is to be had to the following considerations:

(a) The general character and dominant effect of the matter alleged to be obscene.

(b) Evidence as to the literary or artistic merit, or the medical, legal, political, religious or scientific character or importance of the said matter; and for this purpose expert evidence is to be admissible.

(c) Evidence as to the persons to or among whom the matter was, or was intended, or was likely, to be distributed.

(d) Evidence that the matter has had a corrupting effect.[8]

[3] Called Obscene Publications (Consolidation) Bill.
[4] February 3, 1955.
[5] See clauses 12 and 13.
[6] Clause 1.
[7] Clause 4.
[8] Clause 2.

Moreover, a person is not to be convicted of the offence unless the prosecution establishes either that the accused intended[9] to corrupt the persons to whom the matter was intended or was likely to be distributed, or that he was reckless as to whether it would have such an effect.[10] In deciding whether such an intent or recklessness has been proved the court is to have regard to:

(a) The general character of the accused and, where relevant, the nature of his business.
(b) The general character and dominant effect of the matter alleged to be obscene.
(c) Any evidence called by the accused as to his intention in distributing the matter in question.[11]

The author, publisher and printer are also to have the right to give and call evidence in any proceedings under the bill.[12]

Dealing with the power to order the destruction of obscene matter the bill proposes several changes in the existing law. Thus after a magistrate has issued a warrant for the seizure of matter alleged to be obscene the magistrate is forthwith to report the facts to the Director of Public Prosecutions, and also to the persons whose names appear on the matter alleged to be obscene as those of the author, publisher, printer or manufacturer of such matter. Only if the Director gives his consent is a summons then to be issued requiring the occupier of the premises on which the matter was seized, to appear before a court of summary jurisdiction and show cause why the matter seized should not be destroyed. On the hearing of such summons the author, publisher, printer, distributor and manufacturer are to have the right to give and call evidence, and it is to be the duty of the Director to indicate to the court wherein lies the obscenity of the matter in question.[13] Also where the Commissioners of Customs & Excise seize any obscene matter being imported into or exported from the United Kingdom, similar proceedings would have to be instituted for the destruction of the matter in question, as if a magistrate had ordered its seizure from specified premises.[14]

[9] Would this include subconscious as well as conscious intention?
[10] Clause 1, first proviso.
[11] Clause 3.
[12] Clause 2, second proviso.
[13] Clause 8.
[14] Clause 9.

An offence under the Act is to be punishable on summary conviction by a fine of £50 or imprisonment not exceeding four months, or on indictment, the maximum penalties are to be £100 fine, or six months' imprisonment.[15]

According to the memorandum accompanying the draft bill provision is made for all proceedings to be subject to the consent of the Director of Public Prosecutions. This may therefore be accepted as the intention of the committee though in fact the bill as drafted only requires this in the case of proceedings leading to an order for the destruction of works seized as being obscene.

Although this draft is open to a certain amount of criticism in detail it does set out in a practical way the broad lines upon which the present law may be improved. When considering the problem of obscenity we should bear in mind the extent to which the attitude towards sex is a mere matter of convention. Think, for instance, of the scenes and sights on a beach in modern England and imagine what would be the reaction to them by our Victorian predecessors, who viewed mixed bathing, even in costumes which draped the figure from neck to ankle, with something like horror.[16] Would they not regard such scenes, which seem to us quite natural and sensible, as the very re-incarnation of Sodom and Gomorrah? Whereas any one who attempted to bathe today in the costumes regarded up till 1914 as the necessary garments of decency would be treated with hoots of derision. And, again, think of our films, of which sex-appeal is the very essence; our plays, which may dwell on every aspect of sex save (*pace* the Lord Chamberlain) on that of homosexuality; our sex-laden advertisements; our public libraries, whose fiction shelves are crammed with endless novels treating sex with conspicuous frankness; and, above all, think of certain sections of our national press, with its attachment to sex *reportage*. When the recent purge was in full swing, the *Recorder* published an interesting article attacking the then Home Secretary and pointing out the ludicrous situation under which reputable publishers were being prosecuted for publishing novels which circulated among a few thousand because these books dealt frankly with sex, while newspapers with a national circulation are allowed to report freely on

[15] Clause 5.

[16] But for some remarkable disclosures as to bathing conditions in English seaside resorts as late as the 1870s, see C. Pearl, *op. cit.*, pp. 225–237.

sex crimes and distribute their sordid reports into millions of homes.[17] If (said the *Recorder*) the Home Secretary read the *News of the World* and looked through the previous Sunday's issue he would have seen reports on the following matters:

—improper assault on an American girl.
—stealing of woman's underclothing.
—assault on boys aged 9 and 13.
—offence against a girl of 15.
—sending of improper telephone messages.
—serious sexual offences by five young soldiers.
—assault on a girl of 21.
—a serious offence against a nursemaid of 15.
—a charge of living on the immoral earnings of a woman.
—a serious offence against a girl of 17.
—keeping a disorderly house.
—improper assaults on 11 girls and women.
—the rape of a girl of 17.

After pointing out that this newspaper could be bought anywhere in Britain by the most innocent child for 2½d., and that it enjoyed a circulation of eight million, the *Recorder* then asked these pertinent questions:

'Is there any logic in the contention that a people brought up on the *News of the World* is liable to be depraved or corrupted by comic postcards and a thin stream of obscene fiction, featuring a few sexy incidents, or works of literature which deal with sex as they deal with other facts of life?'

'Is a pornographic incident any less pornographic if it really happens?'

Indeed, most of us will agree that to attempt to assess the corrupting influence of a single novel without regard to the social background of our modern community, is to engage in one of those unrealistic exercises which can only bring the administration of our law into contempt by sensible and right-thinking men and women.

Moreover, even at the present day we seem to have made very little, if any progress in investigating the relationship between the publication of sexual, sadistic and horrifying matter and any resultant corruption of those who read it. This is a question that surely lends itself to scientific study by competent investiga-

[17] See the *Recorder*, July 3, 1954.

tors and the results of any such study might go far towards eliminating the merely emotional reaction to this problem. Surely there is a case for the Home Office appointing an expert committee to produce a factual survey as a foundation for future legislation? In the meantime, however, we would probably most of us agree that, on any view of the matter, there is a certain type of crude pornography which can be assumed to be harmful and undesirable and which it will do no harm and may do some good to repress. And even if it were found on full investigation that crudity of this order could not be said actually to cause corruption, it might still continue to be prohibited in the interests of good taste. For while it is true that our present law of obscenity, theoretically at least, pays lip-service to the idea that it is not concerned with standards of taste, but only with the tendency to corrupt,[18] nevertheless, as I have already suggested, much of what we call obscenity is in fact a matter of good or bad taste, and I think we may well concede in the last resort that there are certain minimum standards of taste which any society is entitled to insist on, regardless of any corruption which may result from a departure from these standards. If, however, the criminal law is to be invoked to enforce these standards it must be plain that what is being punished is something more than a mere lapse of taste but so extreme a departure from the minimum contemporary standards recognised by ordinary decent people as to shock the feelings of such people. Viewed honestly and dispassionately I think that the ordinary 'sexy' novel would not involve such a departure but that productions of the type referred to by Stable, J., comprehensively, as 'the literary output of Port Said,'[19] would clearly do so.

Writing recently in the *Times*,[20] Mr. Morris Ernst, whose experience of these matters in the United States is unrivalled, suggests that there is scope here for the application of Mr. Justice Holmes' famous principle, expounded in constitutional and similar cases, of the 'clear and present danger rule,' and he further states that in many cases in which he has been concerned, he has adduced expert testimony not as to whether the work was obscene, but as to the clearness or presence of danger and the

[18] See *e.g.*, *per* Stable, J., in *R.* v. *Martin Secker Warburg Ltd.* [1954] 2 All E.R., at p. 684.
[19] *ibid.*, at p. 687.
[20] October 28, 1954.

precise nature of the danger. In America, where much study has been given to the effect of the printed word on behaviour[1] it may be that such expert evidence is readily available and will be listened to with respect by a court. Even, however, if such evidence were admissible in an English court—and at present of course it is not—it is doubtful whether sufficient data exists or has been adequately studied to enable a court to be much assisted by such expert evidence as might be made available. This suggestion of Mr. Ernst does, however, provide a useful indication of the possible lines of future progress in this controversial field.

In the meantime, it is clear that the community is entitled to be protected against 'filth for filth's sake,' either on account of its presumed corrupting tendency or because it is revolting by our existing canons of taste, but the desire to keep our morals pure must not be used as a means of suppressing that branch of literature which conceives it as its function to deal with the impure side of life. To repeat Mr. Ernst's emphatic language, to do otherwise would be to reduce literature to 'the mush of the feeble-minded, the morons, and the unadults.'[2] Legislation on the lines indicated in the draft bill of the Society of Authors may go some way towards preventing our writers, and ourselves who read them, from falling into that gloomy limbo, but even the most sensible laws require to be sensibly administered. So long as there are politicians, magistrates or policemen who are ready to detect depravity in any reference to sex, whether contained in the *Foolish Virgin says 'No'* or in Joyce's *Ulysses*, there will be danger to one of our most precious freedoms, that of literary expression, which in Stable, J's words, 'represents the sum total of human thought throughout the ages and from all the varied civilisations the human pilgrimage has traversed.'[3] Fortunately English law has never tolerated a censorship of books, but we must not forget that a law of obscenity administered so

[1] Mr. Ernst states (*loc. cit.*) that 'we now know that there is no evidence of any behaviour pattern having a causal relation to the printed word or picture. This does not mean that writing has no effect, but the effect is only a generic societal one.' On the other hand, a study of American horror comics recently published in this country, seems to regard them as a direct contributory cause of juvenile delinquency (see F. Wertham, *Seduction of the Innocent* (1955), though whether this can be said to have been established save on the basis of *post hoc propter hoc* may be open to doubt.

[2] *loc. cit.*

[3] [1954] 2 All E.R., at p. 688.

as to strike not merely at pornography but also at serious literature, may indirectly act as a censorship by restraining publishers from putting before the public new literary works whose value they perceive but which they fear may involve them in prosecution. I venture to suggest that such timidity on the part of our publishers, though understandable enough, would be a grave misfortune, and therefore I say that we should warmly support any proposed reform of the law which—while leaving the pornographer to his just fate—would afford the genuine and honest author and publisher protection to write and publish freely the works of which we, the reading public, will ultimately enjoy the fruits.

6

THE INTENTION OF THE LEGISLATURE IN THE INTERPRETATION OF STATUTES

Douglas Payne

It is said to be the fundamental rule in the interpretation of statutes that a statute should be construed according to the intention of the legislature.[1] In so far as it recognises that the legislature is the supreme law-making body within the state the rule is commonplace and unobjectionable. But in so far as it fosters the belief that the duty of a judge in interpreting a statute is always to search for and give effect to the intention of Parliament, the rule is, I believe, a fatal obstacle to any real improvement in the technique of interpreting statutes.

It is clear in the first place that in interpreting statutes the courts are not concerned with the intention of Parliament as a historical fact, for the courts exclude certain kinds of evidence bearing on Parliament's intention which a scientific historian would attach great importance to, such as the 'parliamentary history' of a statute.[2] There may of course be good practical reasons why a court of law should not open itself to every scrap of evidence bearing on Parliament's intention which would be of interest to a historian. Considerations of time and cost demand that evidence of small probative value should be excluded. But it is important to bear in mind that it is not the will or intention of Parliament as a historical fact that the courts are concerned with, but only the will or intention to be inferred from the kinds of evidence admissible in a court of law. So we are told that 'if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves in such a case best declaring the intention of the lawgiver.'[3]

[1] Maxwell, *The Interpretation of Statutes* (10th ed. 1953), p. 1.

[2] For the history of the rule against referring to parliamentary history, see D. G. Kilgour, 'The Rule against the Use of Parliamentary History' (1952) 30 *Canadian Bar Review*, p. 769.

[3] *Sussex Peerage Case* (1844) 11 Cl. & F. 85 at 143, *per* Tindal, C.J.; Maxwell, *op. cit.*, p. 2.

In fact, of course, the meaning of words is almost always dependent on the context in which they are used, as many of the rules of interpretation recognise. They are the principal, but not the only, signs from which we infer the intention of another. If the ordinary meaning of the words used by a person is completely at variance with what we expect him to say, we often in common intercourse decline to accept them as accurate signs of his intention and conclude that he does not mean what his words ordinarily signify. In doing this, we are engaging in interpretation and doing our honest best to discover intention. It is therefore simply not true that the dictionary meaning of the words used by a person necessarily best declares his intention, even where that meaning is precise and unambiguous. This is indeed recognised by the so-called 'golden' rule of interpretation according to which if the words of a statute in their ordinary sense lead to a result which would be absurd or inconvenient, then the courts will depart from the ordinary meaning of the words so far as to avoid that absurdity or inconvenience.[4] In so doing, the courts generally profess to be giving effect to the true intention of the legislature.[5] But even in the rare cases where the 'golden' rule is invoked, the courts do not extend the range of admissible evidence as to the intention of the legislature, so that although intention is not inferred from the ordinary meaning of the words used, yet it cannot be said that the court inquires into intention as a historical fact. The Parliamentary history of the statute is, for example, still excluded.

I have so far assumed that the intention of the legislature is an objective, historical fact capable of inference from relevant evidence. There are however a number of reasons for rejecting this assumption.

The first of these is that the legislature, being a composite body, cannot have a single state of mind and so cannot have a

[4] Maxwell, *op. cit.*, pp. 6–7 and Chap. 9. It seems that the 'golden' rule will not be applied when the inconvenience or absurdity in question results, not from the immediate application of the Act in the conditions existing when it was passed, but from its being allowed to remain on the statute book long after its purpose is spent: *H.R.H. Prince Augustus* v. *Att.-Gen.* [1955] 3 All E.R. 647 at 657, *per* Evershed, M.R.

[5] 'If the literal interpretation of a statute leads to a result which Parliament can never have intended, the Courts must reject that interpretation and seek for some other interpretation which does give effect to the intention of Parliament': Denning, L.J., in *Francis Jackson Developments Ltd.* v. *Hall* [1951] 2 K.B. 488 at 495.

single intention. Statutes generally provide not for individual acts, persons and events, but for acts, persons and events of a class, and so perforce must make use of general words, very often the general words of ordinary speech, such as, for example, 'accident,' 'article' and 'carriage.' Such general words usually have a hard core of agreed meaning, but, as the cases show only too well, are uncertain on the fringes, there being no agreement in common usage on the range of particulars to which they extend. Context does much to fix the extension of a general word, but even the fullest consideration of context generally leaves an uncertain fringe of meaning, and it is this uncertain fringe of meaning which gives rise to so many problems of statutory interpretation. For example, is linoleum 'furniture'?[6] Is a goldfish an 'article'?[7] Does a man who is murdered suffer an 'accident'?[8] It is impossible to decide such questions by reference to the intention of the legislature since the mental images of the various members of the legislature who vote for a bill containing such a general word will exhibit the same imprecision and lack of agreement as is found in the common usage of the word. This would be true even if every member of the legislature voting for the bill reflected at length on the extension of the particular general word, for reflection would not necessarily entail agreement. And even if all the members were agreed on the extension of the word—if each in his mind thought, for example, that 'furniture' included linoleum—this would not help the courts to construe the word 'furniture' in the Act unless the word is so defined in the Act or there is some other admissible record of their intention. The latter might be provided by Hansard, but Hansard is, as we have seen, inadmissible. Failing some evidence other than the general word itself as to its extension, it is quite clear that in fixing its fringe meaning the courts are not discovering and giving effect to the legislature's intention.

The second and, I believe, more fundamental reason why it cannot be accepted that the task of a judge in interpreting statutes is to search for the intention of the legislature is that the nature of general words necessarily entails that their inter-

[6] *Wilkes* v. *Goodwyn* [1923] 2 K.B. 86 (Yes).
[7] *Daly* v. *Cannon* [1954] 1 W.L.R. 261 (No).
[8] *Nisbet* v. *Rayne and Burn* [1910] 2 K.B. 689 (Yes). See also *Trim Joint District Board of Management* v. *Kelly* [1910] A.C. 667.

preter must exercise a personal discretion in every case where he is precluded from referring back to the user of them for elucidation. This discretion is unavoidable even if all evidence bearing on intention is admitted and even where the user of the general words is an individual person of whom a single state of mind can be predicated.

Various theories have been put forward as to the way in which we use general words.[9] According to one theory we form general ideas and so use general words as the result of abstracting from a number of particulars the feature or features which they have in common, ignoring their many *differentiae*. This was, for example, the view of Locke,[10] and it is one still put forward by some writers today. The trouble with this conceptualist explanation is that it represents the process of generalising as being a complex matter. Yet very young children manage to use general words with remarkable success and it can hardly be supposed that, when they do so, they go through the process of abstracting common features from particulars. The truth appears to be that the range of particulars signified by a general word very often exhibit no common feature at all, or at least no common feature which is peculiar only to those particulars.[11] Consider, for example, such general words as 'tree,' 'shrub,' 'flower,' 'vegetable' and 'fruit.' We all use these words frequently and pretty much in the same way and yet most of us would, I think, be very hard put to it to say what is the general idea underlying our use of any of these words. Dictionaries, of course, profess to define these words, but the definitions, being attempts to rationalise the irrational, seldom correspond exactly with usage. The explanation, I suggest, of our inability to state the general idea underlying our use of such words as these is that we apply them to this particular and that particular not by reference to any

9 See R. I. Aaron, *The Theory of Universals* (Oxford, 1952), Part 1.

10 The matter is discussed in Book 3 of the *Essay Concerning Human Understanding.*

11 Berkeley pointed out that if generalising were in fact based on explicit abstraction, as Locke contended, there would not occur 'those doubts and scruples, about the sorting of particular beings, which are observed sometimes to have happened.' Nor, he thought, was it necessary that 'kinds or species should be so very accurately bounded and marked out. Language being made by and for the common use of men, who do not ordinarily take notice of the minuter and less considerable differences of things.' These observations were made in the *First Draft of the Introduction to the Principles of Human Knowledge,* Luce and Jessop's edition (1949), ii, p. 128,

general idea but simply because we find them so applied by others. Thus, if we find a particular plant called a 'shrub' rather than a 'tree' we tend to do the same without reflecting on the difference between shrubs and trees. I do not of course deny that vague notions of resemblance govern our extension of general words to new particulars, but this bears no resemblance to the logical process described by Locke. When faced with a plant that we have never seen before, we are quite capable of classifying it as either a 'shrub' or a 'tree' without abstracting the general idea of either. Hume long ago remarked on the fact that the perception of a resemblance between two particulars is not dependent on the recognition of a feature common to them. '*Blue* and *green,*' he points out in the *Treatise of Human Nature,*[12] 'are different simple ideas, but are more resembling than *blue* and *scarlet*: though their perfect simplicity excludes all possibility of separation or distinction. It is the same with particular sounds and tastes and smells. These admit of infinite resemblances upon the general appearance and comparison without having any common circumstance the same.'

Hume, in the *Treatise,* has other illuminating things to say about the way in which we use general words. He points out that we often use general words intelligently and successfully without ever having in mind all the particulars covered by the general word, and he instances such words as 'government,' 'church,' 'negotiation' and 'conquest.' He did not deny that we sometimes found our use of a general word on an explicit abstraction. But as a rule our application of a general word is, he thought, governed by custom and the association of ideas. And he noted that in the case of very many general words the speaker or hearer of the words is not able to recall more than a fraction of the many particulars to which the word may be applied.

If one accepts the twin propositions that generalisation is only rarely based on explicit abstraction and that the user of a general word is frequently not able to recall to mind more than a fraction of the particulars to which that word can be applied, both of which are, I think, confirmed by a little introspection regarding our mental processes and ways of speech, what sense is one to make of the view that the task of the judge in interpreting statutes is to discover and give effect to the intention of

[12] Everyman edition, p. 28.

the legislature? Statutes, as we have seen, generally provide, not for particular persons, acts or events, but for persons, acts and events of a class. Legislation, therefore, involves a great deal of generalisation, and generalisation involves the use of the general words of ordinary speech. In using a general word the draftsman or legislator may be expected to reflect longer than most of us on the range of particulars covered by it, but in many cases it will be impossible for him to recall every one to mind. How can it be said that he has any intention in respect of a particular covered by the general word which did not occur to his mind? If the general word is not based on an abstraction, we cannot say that his intention extends to everything indicated by the general idea, since there is none. Even in those cases where the general idea is clear, thus providing a means by which the denotation of the word may be determined, it would, I suggest, be a strange use of language to say that the user of such a general word 'intends' it to apply to a particular that never occurred to his mind.

Many judges and writers, at least in the United States, have recognised the unreality of imputing to the legislature an intention in respect of all problems of statutory interpretation. Some have suggested that the task of a judge faced with a problem of interpretation on which the legislature clearly had in fact no intention is to speculate on what the legislature would have intended had the problem occurred to it. 'Interpretation,' wrote Gray,[13] 'is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; then what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.' This view of the

[13] *The Nature and Sources of Law* (2nd ed. 1921), pp. 172–173.

judges' function in interpreting statutes has won the approval of the United States Supreme Court in a case where it was held that the general word 'possession,' in an Act of Congress which extended to 'any Territory or possession of the United States,' should be construed so as to accord with what 'the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind.'[14]

So far as I am aware no English court has ever suggested that the duty of a court construing general words in a statute is to speculate upon what the legislature would have done had the problem occurred to it. All that we are told is that 'when the statute expresses no intention on a question to which it gives rise, and yet some intention must necessarily be imputed to the Legislature regarding it, the interpreter has to determine it by inference grounded on certain legal principles.'[15] There appears to be no recognition of any problem except in the rare case where a statute is logically defective. Even those bold judges who show themselves prepared to put a strained interpretation upon the words of a statute in order to avoid what seems to them an absurdity invariably profess to be giving effect to the intention of the legislature. The current American doctrine, requiring the court to do as the legislature would have done, is clearly an improvement upon the doctrine professed by English judges in so far as it recognises the fiction so often involved in searching for legislative intention. But the American doctrine is not, I venture to suggest, the most sensible way of dealing with problems of interpretation where no intention can honestly be attributed to the legislature.

It is attended with several of the defects of the more primitive view which it supplants. Thus, if the duty of the court is to discover or guess what the legislature would have done, it is difficult to justify the exclusion of the parliamentary history of a statute. Much criticism has been levelled at the English rule which excludes reference to parliamentary history in the interpretation of statutes, most of it, in my opinion, misguided. It is true that the rule has sometimes been invoked by the courts to justify perverse interpretations, but the remedy lies, not in allowing reference to parliamentary history, but in a changed approach

[14] *Vermilya-Brown Co.* v. *Connell* (1948) 335 U.S. 377 at 386–388.
[15] Maxwell, *op. cit.*, p. 2.

to the whole problem of statutory interpretation. Good judges are quite able to construe a statute in the light of its 'policy' without admitting evidence from its parliamentary history. The value of such evidence would not as a rule compensate for the additional time and trouble involved in admitting it, for as M. Planiol has remarked: 'Les travaux préparatoires fournissent des armes à tous les partis et les diverses opinions en présence y trouvent des arguments qui s'annulent réciproquement.'[16] French writers are by no means agreed on the superiority of their own rule, which permits reference to *travaux préparatoires*, over our own.

In the United States also there has of late been much criticism of the Supreme Court's relaxation of the former rule against parliamentary history. It has led to the undesirable practice on the part of members of Congressional committees and their counsel of working into the record statements of the intention of a bill in the hope that such statements may influence the interpretation put upon the Act by the courts when recourse is had to the record of Congressional proceedings. Interested parties set out to manufacture parliamentary history during a bill's passage through Congress. The conclusions of the late Mr. Justice Jackson, a member of the Supreme Court, are worth noting. After remarking on the dubious help to be gained from reference to the parliamentary history of an Act, he says[17]: 'The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires executive approval, or enough support to override a veto. How far, then, should this formal text and content be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself? . . . It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage. . . . The custom of remaking statutes to fit their histories has gone so far that a formal

[16] *Traité élémentaire de Droit Civil*, Vol. 1, p. 86.
[17] 'The Meaning of Statutes: What Congress Says or What the Court Says' (1948) 34 *A.B.A.J.*, pp. 537–538.

Act . . . is no longer a safe basis on which a lawyer may advise his client, or a lower court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available.'[18] These objections are equally applicable to parliamentary history in this country. As Allen remarks,[19] 'our judges are not wholly misled by their instinct when they distrust these uncharted waters.'

A statute is a formal and definitive document. As one writer has pertinently remarked, 'the specific individuals who make up the legislature are men to whom a specialised function has been temporarily assigned. That function is not to impose their will . . . on their fellow citizens, but to pass statutes, which is a fairly precise operation. . . . When the legislature has uttered the words of a statute, it is *functus officio,* not because of the Montesquieuan separation of powers, but because that is what legislating means.'[20] The words used by the legislature cannot be disregarded in favour of a supposed but unexpressed intention.[1] If, as Holmes once said, words are not crystals, neither are they portmanteaus into which can be squeezed any meaning whatever.[2] There is a point beyond which the words of a statute do not permit a court to go in giving effect to the supposed intention of the legislature, and this is equally true of any supposed intention it would have had if the problem had occurred to it.[3]

[18] In *U.S.* v. *Howell Electric Motors Co.,* 78 F. Supp. 627, 630 (E.D. Mich. 1948), *affd.* 172 F. 2d 953 (6th Cir. 1949) a federal judge admitted as an extrinsic aid to the construction of an Act of Congress the affidavits of a congressman and the counsel for an administrative agency as to their understanding of the intention of Congress in enacting the statute.

[19] *Law in the Making* (5th ed. 1951), p. 491.

[20] Radin, 'Statutory Interpretation' (1930) 43 *Harvard Law Review,* p. 863, at p. 871.

[1] 'The beliefs or assumptions of those who frame Acts of Parliament cannot make law': Lord Radcliffe in *I.R.C.* v. *Dowdall, O'Mahoney & Co.* [1952] A.C. 401 at 426.

[2] Radin, *op. cit.,* p. 866, who speaks of the maximum and minimum extension of a word.

[3] The judges occasionally recognise this when they insist that 'what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by any necessary implication': *Salomon* v. *Salomon* [1897] A.C. 22 at 38, *per* Lord Watson; Allen, *op. cit.,* pp. 475–476.

Further, many of the problems of interpretation which come before the courts are of such a nature as to make it highly artificial to ask what the legislature would have done or said at the time had the problem occurred to it. This is especially so when the question is whether general words extend to things not in existence and therefore not known at the time when the statute was passed.[4] It has for example been held that a bicycle is a 'carriage' within the meaning of the Highway Act, 1835, though the bicycle had not then been invented.[5]

I have spent a good deal of time criticising theories of statutory interpretation which require a court to hunt for legislative intention in some form. What alternatives are there? I believe that the only sensible way of approaching problems of statutory interpretation is to recognise that, because of the limitations of the human mind and of language, interpretation necessarily involves a delegation by the legislature to the interpreter of the task of determining the particular application of a general rule, and that this delegated power and duty in no significant respect differs from an express delegation of legislative power. A statute is a formal document intended to warrant the conduct of judges and officials, and if any intention can fairly be ascribed to the legislature, it is that the statute should be applied to situations not present to the mind of its members. The proper office of a judge in statutory interpretation is not, I suggest, the lowly mechanical one implied by orthodox doctrine, but that of a junior partner in the legislative process, a partner empowered and expected within certain limits to exercise a proper discretion as to what the detailed law should be. His discretion is limited by the words used by the legislature, or rather by the possible extention of those words within the context in which they are used, for consideration even of the widest context will nearly always leave some discretion to the judge as to the meaning of a word. The limits set to his discretion by the words and their context may be compared with the doctrine of *ultra vires* by which expressly delegated powers are limited.[6]

[4] Maxwell, *op. cit.*, pp. 79–80; Allen, *op. cit.*, pp. 473–474.

[5] *Taylor* v. *Goodwin* [1879] 4 Q.B.D. 228. See also *Att.-Gen.* v. *Edison Telephone Co.* [1880] 6 Q.B.D. 244; *Re Radio Communication in Canada* [1932] A.C. 304.

[6] 'A judge has a discretion to include a flying-boat within a rule as to ships or vessels; he has no discretion to include a motor car within such a rule': Glanville Williams, 'Language and the Law' (1945) 61 *Law*

This conception of the role of the judge in statutory interpretation is often implicit in parliamentary debates. Ministers frequently defend the use in a Bill of general words of uncertain import on the ground that it is not practicable to try to make more detailed provision and that the courts may be trusted to work out the detailed application of the general words. And it is not unknown for a Minister to refuse to say whether a particular situation would fall within the scope of the general words used on the ground that such problems may safely be left to the good sense of the courts. Sometimes, indeed, to get a Bill through Parliament, its sponsors may deliberately incorporate in it equivocal words so as to gain the support or avoid the opposition of those members who would be compelled by conscience or some more sordid consideration to withhold their support or oppose the measure if its probable effect were made more explicit. In the light of such facts it is nonsense to suggest that a judge should construe such a statute according to the intention of the legislature.

That interpretation of general words is a legislative process is shown by the fact that the same formula of general words may in one statute be left to the courts to interpret while in another a statutory definition may be provided. For example, the Infanticide Act, 1922, provided that a woman who caused the death of her 'newly born' child at a time when the balance of her mind was disturbed by reason of the birth should be guilty of the crime of infanticide, the punishment for which was imprisonment. The Act was passed so as to avoid the state of affairs in which sentence of death for murder was pronounced but never executed. The judges however interpreted the general words 'newly born' so as to exclude a child one month old,[7] which deprived the Act of much of the effect it was expected to have. In consequence, in 1938, another Act was passed which substituted for the phrase 'newly born child' the phrase 'being a child under the age of twelve months.' Thus the first Act involved a delegation to the judges of the legislative power of

Quarterly Review, p. 303. In *Polpen Shipping Co.* v. *Commercial Union Assurance Co.* [1943] K.B. 161 it was held that a flying-boat is not a 'ship or vessel.' In *McBoyle* v. *United States* (1931) 283 U.S. 25 the Supreme Court held that an aeroplane was not a 'motor vehicle' within the meaning of a Federal statute, though the possible extension of the term would certainly have permitted the inclusion of an aeroplane.

[7] *R.* v. *O'Donoghue* (1927) 97 L.J.K.B. 303.

determining when a child was 'newly born,' while the second provided in effect a legislative definition of those general words. Another example is provided by those statutes which make use of the expression 'offensive weapon,' The expression has generally been used without any attempt to define it, thereby leaving to the judges a wide discretion as to what is or is not an 'offensive weapon.'[8] But in the Prevention of Crime Act, 1953, a statutory definition is provided which limits the judges' discretion.[9] Thus the courts are often entrusted in the interpretation of statutes with a legislative function which at other times is discharged either by the legislature itself or by some person or body making regulations under an expressly delegated power.

The judges have generally been critical of the employment of general words in statutes and do not as a rule relish the discretion involved in their interpretation.[10] Yet limitations of language and human foresight make the use of such words unavoidable in much modern legislation. The perfect statute that would not require interpretation is just an idle dream. Interpretation is interstitial legislation, patently so when the courts have to interpret such words as 'reasonable' and 'fair,' which are often found in modern statutes; no less so, though less obviously, when they have to interpret general words with uncertain fringe meanings. It may indeed be the chief merit of a statute that by its employment of general words it is possible to adapt it to changing social needs. This is especially true when the instrument is one which can be amended only with the greatest difficulty, like the United States Constitution. The experienced draftsman will not try to keep the judges on too tight a rein.

In one respect, common law judges might be expected to find it more congenial to construe a statute containing broad, general provisions than one which is precise and detailed, since the broader the statutory provision the more scope there is in its

[8] *e.g.*, Night Poaching Act, 1828, s. 9; Customs Consolidation Act, 1876, s. 189; Larceny Act, 1916, s. 23 (1); Public Order Act, 1936, s. 4 (1).

[9] The actual definition provided is however very wide and so does not limit the judges' discretion to any great extent: see s. 4 of the Act.

[10] Judges have, for example, often criticised the draftsman of the Workmen's Compensation Act, 1906, for using such ordinary words as 'an accident arising out of and in the course of his employment': *Armstrong, Whitworth & Co., Ltd.* v. *Redford* [1920] A.C. 757 at 780 (Lord Wrenbury). Cf. Lord MacMillan, *Law and Other Things* (1937), p. 160 *et seq.*

interpretation for the application of traditional common law techniques. The great body of case law formally based on the formula 'an accident arising out of and in the course of his employment' in the Workmen's Compensation Act, 1906, differs very little in point of judicial technique from the case law of other subjects unadulterated by statute, and the same may be said of the case law relating to the grounds of divorce, all of which is founded on a few general statutory provisions. But in fact the judges have, as I have said, usually been critical of the use of general words by the legislature.

If one accepts the view that the interpretation of statutes necessarily and properly involves a delegation to the judges of some degree of legislative discretion, there still, of course, remains the question how that discretion should be exercised. An American writer has suggested that, rather than search for a non-existent intention or speculate upon what the legislature would at the time have done about the problem had it occurred to them, the courts should consider 'what the present or a future legislature would do after it had read the court's opinion, after the situation has been explained, after the court has exhibited the whole fabric of the law into which this particular bit of legislation had had to be adjusted.'[11] The legislature would then, he says,[12] 'be acting, if it did act, in the light of the tradition of the whole of law, which is what the courts expound and still stand for.' But this suggestion seems to ignore the fact that the words of an Act set limits to the court's discretion in interpreting a statute. The possible extension of the words of an Act may not permit the court to do what the legislature now would do if the problem were explained. If one fails to recognise the limits set upon the court's discretion by the words of the statute, it is difficult to see what sense there is in talking about interpretation at all. A further objection to this view is that it involves an inquiry into what the legislature would do now, a matter as uncertain and speculative and just as artificial as what it would have done at the time when the Act was passed.[13]

Judge Frank compares the function of a judge in interpreting

[11] C. P. Curtis, 'A Better Theory of Legal Interpretation,' 3 *Vanderbilt Law Review*, p. 407, at p. 415.
[12] *ibid.*, pp. 415–416.
[13] Should one, for example, take into account which party is in power at the time?

statutes with that of the interpreter of a musical score.[14] Just as there are many who conceive of statutory interpretation as a mechanical process of searching for and giving effect to the intention of the legislature, so there are composers and others who conceive of the role of the interpreter of music as one in which the intention of the composer is to be sought for and authentically rendered. It is however impossible to neutralise completely the personality and imagination of the interpreter of music, partly because of the limitations of musical notation, partly because of the inevitable character of musical interpretation. Nor in many cases does a composer desire to stifle completely the creativeness of the interpreter of his music. Wagner, it seems, abandoned metronomic marking of his scores after experience of interpretation which faithfully followed it. Frank suggests that the interpreter of a statute, like the interpreter of music, should read it 'with an insight which transcends its literal meaning.'[15] His creativeness should be limited, but, as in the interpretation of music, within proper limits, it is a boon not an evil. Composers who would exclude altogether the creativeness of an interpreter are compared with Frederick the Great and Napoleon who thought by the provision of codes to do away with the need for judicial interpretation.[16]

Frank develops the parallel between the two kinds of interpretation at considerable length. But the analogy, though striking, is not really very helpful, and, like most analogies, is inclined, if carried too far, to be misleading. Interpretation of statutes, though it involves creative choice, is not an expression of artistic feeling. I doubt whether any judge would be helped by being told that he should interpret statutes in the way that a fine musician interprets a musical score. Judges should not, Frank tells us, exploit their personal prejudices in interpreting statutes, but should try to base their solutions on their honest estimates of the community's sense of values.[17] The difficulty here of course is that in respect of many matters there is, within one society, no agreement on values, but rather a struggle between competing values. It would, for instance, be a bold man who

[14] See Frank, 'Words and Music' (1947) 47 *Columbia Law Review*, p. 1259; *Courts on Trial* (1949), Chap. 21.
[15] *Courts on Trial*, p. 300.
[16] *ibid.*, p. 301.
[17] *ibid.*, p. 304.

ventured to say what in present-day England is the community's sense of values in respect of divorce or rent restriction, and yet the courts are constantly having to interpret the general words of statutes dealing with these topics. And even if there were agreed values on some particular matter, it is difficult to see how the judge is to discover what they are or why he should in every case be governed by them.

My own view is that the exercise of judicial discretion, whether in the interpretation of statutes or in the many other fields where it is found, is necessarily and properly a matter of the judge's personal judgment, and that no more need be asked than that he should exercise it in a responsible and judicial manner. In interpreting statutes, as in other fields where discretion is conferred upon them, the judges must be trusted to follow their own sense of fitness and propriety. This does not mean that a judge will be governed in his interpretation of a statute simply by his own personal sense of justice, even supposing that the words would allow such an interpretation, for the law is a system, not a miscellaneous set of rules, and the solution dictated by his personal sense of justice may not be compatible with the rest of the law.

The cases show that the courts, while paying lip-service to the theory of discovering legislative intention, do in fact construe statutes, so far as the words allow, in such a way as to produce results which satisfy their sense of fitness.[18] Established canons of construction can be cited to support both the narrowest and most liberal interpretations, and sharp differences of judicial opinion in statutory interpretation are generally attributable to different views of policy rather than to different views on interpretation.[19] Some of the rules invoked by the courts show clearly the dependence of interpretation on conceptions of policy. The most obvious example of these is the so-called 'golden' rule which justifies a departure from the ordinary meaning of words in

[18] This is shown by many of the presumptions invoked in interpreting statutes, such as the presumption against intending injustice or absurdity. Cf. Lord Goddard, C.J., in *Hill* v. *Minister of Pensions* [1955] 2 All E.R. 890 at 893: 'I do not think that any Court would be astute to construe the Family Allowances Act, 1945, to produce a result which would certainly be extravagant so far as the taxpayers (who have to find the money for these family allowances) are concerned . . .'

[19] Willis, 'Statute Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review*, p. 1.

order to avoid a result which would be absurd. Absurdity is, of course, a matter of opinion, on which the judges themselves have frequently disagreed.[20] Another is the so-called presumption against the legislature intending what is inconvenient or unreasonable.[1] The cases in which the pretence of discovering the intention of the legislature is perhaps most obviously a fiction are those in which the courts decide whether it was the intention of the legislature to confer a private right of action for damages on a person aggrieved by the breach of a statutory duty.[2] Here, as elsewhere, the so-called rules are frequently contradictory, and the decision whether or not to allow an action for breach of a statutory duty clearly depends ultimately on the court's views of justice and policy.[3] It can hardly be doubted that this branch of the law would be much improved if the judges were to abandon the myth of legislative intention and recognise frankly that in these problems of interpretation, as in others, they are obliged and expected to exercise a discretion conferred on them by the legislature. There are, indeed, signs of a new and more realistic approach to this particular field of statutory interpretation. In a recent paper Lord Evershed, M.R., recognises frankly that the decision whether or not a civil action lies for breach of a statutory duty is generally left by Parliament to the discretion of the judges, and he suggests that this shows 'the acceptance by Parliament of the view that the incidents of important private rights (and personal rights, too) may find more satisfactory and coherent expression in the evolutionary process of the courts than by dependence on the inclusion of a number of separate and perhaps varying provisions in the enacted law which might, at the time, prove politically contentious.'[4]

If the interpretation of statutes does in fact invariably involve the exercise of judicial discretion, if, as I have suggested in this paper, the function of a judge in interpreting a statute is properly

20 See *Nokes* v. *Doncaster Collieries* [1939] 2 K.B. 578; [1940] A.C. 101.

1 Maxwell, *op. cit.*, pp. 191–200.

2 *ibid.*, pp. 393–402; *Winfield on Tort* (6th ed. 1954), pp. 193–197; Salmond, *Torts* (11th ed. 1953), Ch. 15; Street, *The Law of Torts* (1955), Ch. 14.

3 'Many of the decided cases can, for the most part, be regarded as judicial decisions of policy whether breaches of certain provisions should be compensated for in damages': Street, *The Law of Torts* (1955), p. 284.

4 'Government under Law in Post-war England,' (1956) 72 L.Q.R. 42 at 52–53.

described as that of a junior partner in the legislative process, it is clearly better that a judge should recognise that this is so than that he should delude himself and others into thinking that the particular interpretation he favours is properly attributable to the intention of the legislature. If he and others recognise the existence of this discretion, it is more likely to be exercised in a responsible fashion than where, as at present, its existence is not recognised. A judge conscious that he is exercising a discretion is more likely to found his judgment on general considerations of social advantage and less likely to be influenced by personal bias and prejudice than one who is not. The declaratory theory of the judicial function has often concealed from judges the fact that they have taken sides on controversial and debatable questions and the fiction that the courts discover and give effect to the intention of the legislature in interpreting statutes is merely one manifestation of the declaratory theory. A judge must of course often take sides on controversial questions, for the law can rarely be neutral. But at least he should know what he is about.

7

REVISION OF THE SALE OF GOODS ACT

E. R. H. Ivamy

Until very recently the Sale of Goods Act, 1893, has remained virtually unrepealed [1] in its entirety. But in 1954 a serious inroad was made when the notorious section 4 relating to contracts for the sale of goods of the value of £10 or upwards was swept away.[2] The question now arises as to whether some more general measure of reform is necessary, and in this paper various aspects of the matter will be considered. These relate to (1) the exclusion of the statutory conditions and warranties; (2) the incorporation of the Factors Act, 1889, into the Sale of Goods Act; (3) international sales; and (4) sales in market overt.

THE EXCLUSION OF THE STATUTORY CONDITIONS AND WARRANTIES

The Sale of Goods Act, 1893, reflects the end of an era when contracts of sale were made between customers and retailers with special terms incorporated in them to meet the needs of the particular parties concerned. Individual contracts were made between retailers and manufacturers, separate provision being agreed on in each case. How great a change has come about in the last sixty years in the organisation of commerce can best be seen in a few examples. Today so much business is carried on with reference to price lists,[3] order forms [4] and catalogues [5] of manufacturers and wholesalers which set out in detail the

1 Sections 60 and 63 and the Schedule were repealed by the Statute Law Revision Act, 1908.

2 Law Reform (Enforcement of Contracts) Act, 1954, s. 2. See generally *Craxfords (Ramsgate) Ltd.* v. *Williams & Steer Manufacturing Co., Ltd.* [1954] 1 W.L.R. 1130.

3 *William Jacks & Co.* v. *Palmer's Shipbuilding & Iron Co., Ltd.* (1928) 34 Com.Cas. 107.

4 *L'Estrange* v. *F. Graucob Ltd.* [1934] 2 K.B. 394; *Roe* v. *R. A. Naylor Ltd.* [1917] 1 K.B. 712.

5 *Walls* v. *Centaur Co., Ltd.* (1921) 126 L.T. 242; *Grenfell* v. *E. B. Meyrowitz Ltd.* [1936] 2 All E.R. 1313; *Nicholson* v. *Smith Marriott* (1947) 177 L.T. 189.

terms on which orders will be accepted, and on which alone they will regard themselves as liable. The trade associations concerned with the sale of general produce and commodities have standard forms of contract by which both buyers and sellers and their brokers are bound.[6] The growing complexities of manufactured articles in the modern age, *e.g.*, television sets and motor cars[7] have led to the introduction of closely worded written contracts designed for mass use, and the customer is required either to sign them without alteration or make his purchase elsewhere if he can.

Before the Act of 1893 certain conditions and warranties were implied whenever a contract for the sale of goods was made, and these were given statutory form in sections 10 to 15 with certain modifications. But under the common law the parties were free to make what contract they liked[8] and the conditions and warranties were implied only if no different intention appeared. This freedom of contract was perpetuated in the Sale of Goods Act, 1893, s. 55, which provides that 'where any right duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties,[9] or by usage if the usage be such as to bind both parties to the contract.'[10]

But it is only with express agreements that we are concerned in this paper, for the other two cases are comparatively unimportant.

[6] *e.g., Central Meat Products Co., Ltd.* v. *J. V. McDaniel Ltd.* [1952] 1 Lloyd's Rep. 562 (London Corn Trade Association Contract); *Andre et Cie. S.A.* v. *J. H. Vantol Ltd.* [1952] 2 Lloyd's Rep. 282 (London Oil and Tallow Trades Association Contract—Coconut Oil); *Harrison & Jones* v. *Bunten & Lancaster* [1953] 1 Q.B. 646 (Kapok Trade Association Contract); *F. E. Hookway & Co., Ltd.* v. *Alfred Isaacs & Sons* [1954] 1 Lloyd's Rep. 491 (London Shellac Trade Association Contract); *R. Simon & Co., Ltd.* v. *Peder P. Hedegaard A/S* [1955] 1 Lloyd's Rep. 299 (London Corn Trade Association Contract); *J. H. Vantol Ltd.* v. *Fairclough Dodd & Jones Ltd.* [1955] 1 W.L.R. 1302 (C.A.) (London Oil and Tallow Trades Association Contract for Oriental Oils).

[7] *Baldry* v. *Marshall* [1925] 1 K.B. 260; *Andrews Bros. (Bournemouth) Ltd.* v. *Singer & Co., Ltd.* [1934] 1 K.B. 17; *Webster* v. *Higgin* [1948] 2 All E.R. 127.

[8] Cf. *Calcutta and Burmah S.N. Co., Ltd.* v. *De Mattos* (1863) 32 L.J.Q.B. 322 at 328 (*per* Blackburn, J.) as to variation of time of payment and delivery; and *Honck* v. *Muller* (1881) 7 Q.B.D. 92 at 103 (*per* Brett, L.J.) as to sale of goods to be delivered by instalments.

[9] *Horn* v. *Minister of Food* [1948] 2 All E.R. 1036.

[10] *Cointat* v. *Myham & Sons* (1915) 84 L.J.K.B. 2253 (usage amongst traders at Smithfield Market to give no warranty in the sale of meat).

In many of the standard forms of contract the opportunity of making use of the provisions of section 55 has been taken, and attempts have been made to exclude the implied conditions and warranties laid down by the Act, though the question whether they have been successful or not is a matter of construction for the Court in each case. The principal conditions and warranties which sellers have sought to exclude are those relating to title,[11] description,[12] fitness for purpose,[13] merchantable quality,[14] and samples.[15]

In interpreting these exclusion clauses the courts are guided by the maxim *verba chartarum fortius accipiuntur contra proferentes, i.e.,* if the words are ambiguous, they are construed against the person causing them to be drafted, who, of course, is usually the seller.[16]

Similarly, a strict interpretation of the words and phrases used is adopted. Thus in the leading case of *Wallis* v. *Pratt*[17] a term in a contract which excluded 'warranties' was held not to exclude 'conditions' even though by accepting the goods the purchaser could only treat the breach of the condition as a breach of warranty. Again in *Andrews Bros. (Bournemouth) Ltd.* v. *Singer & Co., Ltd.*[18] a term excluding liability for breach of *implied* conditions and warranties was held not to apply to the breach of an *express* condition. In *V. Berg & Sons* v. *Landauer*[19] the expression 'E. & O.E.' was held not to be sufficient to rectify an error in the date of a bill of lading which was a material term in the contract. In *Champanac & Co., Ltd.* v. *Waller & Co., Ltd.*[20] the contract contained a term that the goods were sold 'with all faults and imperfections.' The sale was by sample, and the Court held that the term used did not exonerate the seller from delivering goods which themselves corresponded with the

11 Sale of Goods Act, 1893, s. 12.
12 *ibid.*, s. 13.
13 *ibid.*, s. 14 (1).
14 *ibid.*, s. 14 (2).
15 *ibid.*, s. 15. See further 'Sale by Sample' (E. R. Hardy Ivamy) (1956) 100 *The Solicitors' Journal*, p. 254.
16 For examples of the application of this maxim in insurance law see *Houghton* v. *Trafalgar Insurance Co., Ltd.* [1953] 2 Lloyd's Rep. 503; *English* v. *Western* [1940] 2 K.B. 156; *Lake* v. *Simmons* [1927] A.C. 487; *Provincial Insurance Co., Ltd.* v. *Morgan* [1933] A.C. 240.
17 [1911] A.C. 394.
18 [1934] 1 K.B. 17.
19 (1925) 42 T.L.R. 142.
20 [1948] 2 All E.R. 724.

sample, although they might turn out to have other faults and imperfections. Slade, J., rejected the contention that the term meant that the buyers agreed to accept any goods the bulk of which corresponded to the sample whatever faults and imperfections there turned out to be in the sample. In *Minister of Materials* v. *Steel Bros & Co., Ltd.*[1] a clause restricting the buyer's right to claim if goods were of inferior quality was held not to bar a claim in respect of damage suffered through the adhesion of defective coverings in which the sellers had wrapped them.

It would appear that if a clause is sufficiently widely drafted, the seller can exclude most of the implied conditions and warranties. But a difficult question arises as to whether the implied condition of description set out in section 13 can be so excluded. In *Andrews Bros. (Bournemouth) Ltd.* v. *Singer & Co., Ltd.*[2] there is an indication in the judgment of Scrutton, L.J., that this can be done,[3] though the case itself was concerned with an express condition that the car to be supplied was to be a new one. It may be observed that if the seller is allowed to contract out of the condition concerning description, he would fulfil his contract in a similar case if he delivered a veteran motor car, or if he delivered something which in no way resembled a car at all! Support is given for this view in *L'Estrange* v. *F. Graucob Ltd.*[4] where the exclusion clause said that the seller was to be under no liability for 'any express or implied condition, statements or warranty, statutory or otherwise.' On the other hand, breach of the condition of description may constitute a fundamental breach of contract within the scope of the decision in *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 1)*[5] so that the seller cannot rely on an exclusion clause however widely drafted, *e.g.*, if in this case he had delivered pine logs instead of mahogany logs.

But should sellers be permitted to contract out of the conditions and warranties implied by the Sale of Goods Act, 1893? To rule that this should no longer be possible would perhaps be unfair,[6] but as a partial remedial measure to the present state

[1] [1952] 1 All E.R. 522.
[2] [1934] 1 K.B. 17.
[3] At p. 23.
[4] [1934] 2 K.B. 394.
[5] [1953] 1 W.L.R. 1468. See also *Vigers Bros.* v. *Sanderson Bros.* [1901] 1 K.B. 608.
[6] But see generally *Printing & Numerical Registering Co.* v. *Sampson*

of affairs limitations on the freedom of contract similar to those laid down in the Hire-Purchase Act, 1938, s. 8, might be imposed. This states that in every hire-purchase agreement to which the Act applies[7] there is:

> (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods[8]; (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass[9]; (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass[10]; and (d) except where the goods are let as second-hand goods[11] an implied condition that the goods shall be of merchantable quality[12] except in certain cases.[13]

It is to be noticed that these conditions and warranties can-

(1875) L.R. 19 Eq. 462 at 465: 'If there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.' (*Per* Jessel, M.R.)

7 The financial limits of the Act of 1938 have been raised by the Hire-Purchase Act, 1954. The Acts apply to agreements relating to livestock under which the hire-purchase price does not exceed £1,000, and any other agreement under which the hire-purchase price does not exceed £300. See generally 'The Control of Hire-Purchase' (1954) 21 *The Solicitor* p. 162 and 'Some Aspects of Hire-Purchase Law,' *ibid.*, p. 242, written by the present writer.

8 Cf. Sale of Goods Act, 1893, s. 12 (2); *Niblett* v. *Confectioners Materials Co.* [1921] 3 K.B. 387.

9 Cf. Sale of Goods Act, 1893, s. 12 (1) and *Rowland* v. *Divall* [1923] 2 K.B. 500. See *Karflex Ltd.* v. *Poole* [1933] 2 K.B. 351 as to agreements outside the scope of the Acts. For the recovery of the hire-purchase price if the owner had no title when the property was to pass, see *Warman* v. *Southern Counties Car Finance Corporation Ltd. (W. J. Ameris Car Sales Third Party)* [1949] 2 K.B. 500.

10 Cf. Sale of Goods Act, 1893, s. 12 (3).

11 And the note or memorandum required by the Act contains a statement to that effect.

12 Cf. Sale of Goods Act, 1893, s. 14 (2). Cases illustrating the interpretation of this term include *Bristol Tramways Co.* v. *Fiat Motor Ltd.* [1910] 2 K.B. 831: *Jackson* v. *Rotax Motor & Cycle Co.* [1910] 2 K.B. 937; *Sumner Permain & Co.* v. *Webb & Co.* [1922] 1 K.B. 55; *Shields* v. *Honeywill & Stein Ltd.* [1952] 2 Lloyd's Rep. 406: reversed on another point [1953] 1 Lloyd's Rep. 357; *Wilson* v. *Rickett Cockerell & Co. Ltd.* [1954] 1 Q.B. 598. See generally 'The meaning of "merchantable quality" in s. 14 of the Sale of Goods Act, 1893' (E. R. Hardy Ivamy) (1953) 20 *The Solicitor*, p. 87.

13 This condition does not apply as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made, or, if the hirer has examined the goods or a sample thereof, as regards defects which the examination ought to have revealed.

not be excluded by the terms of the agreement.[14] Similarly, where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there is an implied condition that they should be reasonably fit for such purpose.[15] The owner cannot rely on a clause excluding this condition unless he can prove that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him.[16] The provision in the Sale of Goods Act as to the condition of fitness for the purpose requires that the seller must usually deal in such goods,[17] and there is a special rule as to goods sold under their patent or trade name.[18] This provision could perhaps be kept in any amending Bill which might be put forward.

THE INCORPORATION OF THE FACTORS ACT, 1889, INTO THE SALE OF GOODS ACT

When the Sale of Goods Act was passed in 1893, no attempt was made to incorporate those provisions of the Factors Act, 1889, which relate to the sale of goods by mercantile agents, and to present the law on this subject as a whole, and it is difficult to understand why this opportunity was missed by the draftsman. Nevertheless in the light of the reported decisions on the Factors Act possibly a more adequate measure of consolidation which would be of advantage to the business community could now be undertaken. In any new legislation on this matter consideration might perhaps be given to a number of points.

The Factors Act, 1889, s. 1 (1) states that 'the expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent either authority to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.' In a decision on the interpretation of the Factors Act, 1842,[19]

[14] Hire-Purchase Act, 1938, s. 8 (3).
[15] *ibid.*, s. 8 (2).
[16] *ibid.*, s. 8 (3).
[17] Sale of Goods Act, 1893, s. 14 (1). *Spencer Trading Co., Ltd.* v. *Devon (Fixol & Stickphast Ltd., Third Parties)* [1947] 1 All E.R. 284.
[18] Sale of Goods Act, 1893, s. 14 (1). See *Baldry* v. *Marshall* [1925] 1 K.B. 260 (eight cylinder Bugatti car); *Grenfell* v. *E. B. Meyrowitz Ltd.* [1936] 2 All E.R. 1313 (safety glass); *Harris & Sons* v. *Plymouth Varnish and Colour Co., Ltd.* (1933) 49 T.L.R. 521 (paint); *Wilson* v. *Rickett Cockerell & Co., Ltd.* [1954] 1 Q.B. 598 (coalite).
[19] *Heyman* v. *Flewker* (1863) 13 C.B.N.S. 519.

Willes, J., said that[20] 'the term "agent" does not include a mere servant or caretaker or one who has possession of goods for carriage, safe custody or otherwise as an independent contracting party but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name.'[1]

It has been decided that the agent must be acting in a business capacity, and if he is given the goods to sell merely as a friend, he cannot be a mercantile agent.[2] One would have thought that the agent should carry on a regular business as a mercantile agent. But the reported cases show otherwise. In *Heyman* v. *Flewker*[3] an insurance agent was held to be an agent within the Factors Act, 1842, even though he had been entrusted to sell pictures on one occasion only. Similarly, in *Lowther* v. *Harris*[4] an antique dealer was held to be a mercantile agent for the sale of a tapestry even though he acted for one principal only. In only one case[5] has it been held that the Act of 1889 applies only to persons of the class ordinarily carrying on the business of mercantile agents, but this was later overruled by the Court of Appeal.[6]

It is suggested that the courts might well have given further consideration to the interpretation of section 1 (1) for the words are 'in the customary course of his business as such agent,' and this surely implies that a man cannot be a mercantile agent in respect of a single transaction. The matter might be clearly set at rest by a provision that the agent must carry on a *regular* business. In the present state of the law it would appear that the purchaser is unduly favoured. He should be given protection only if he purchases from a recognised dealer.

Section 2 (1) of the Factors Act, 1889, provides that 'where a mercantile agent is with the consent of the owner in possession of goods or the documents of title to goods any sale . . . made

[20] At p. 527.

[1] Wharfingers were held not to be agents within the meaning of the earlier Acts in *Monk* v. *Whittenbury* (1831) 2 B. & Ad. 484; nor wine merchants' clerks, *Lamb* v. *Attenborough* (1862) 1 B. & S. 831; nor warehousekeepers, *Cole & Another* v. *North Western Bank* (1875) L.R. 10 C.P. 354.

[2] *Budberg* v. *Jerwood & Ward* (1934) 51 T.L.R. 99.

[3] *Supra.*

[4] [1927] 1 K.B. 393.

[5] *Hastings Ltd.* v. *Pearson* [1893] 1 Q.B. 62.

[6] *Weiner* v. *Harris* [1910] 1 K.B. 285.

by him when acting in the ordinary course of business of a mercantile agent shall . . . be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.'

No definition of the term 'consent' is given in the Act, but the Court of Appeal has recently settled in *Pearson* v. *Rose & Young Ltd.*[7] a controversy of long standing.[8] The artificial distinctions of the criminal law are now not to be applied to a commercial transaction, and a mercantile agent is to be regarded as in possession of the goods with the consent of the owner whether he has obtained them by false pretences or by larceny by a trick. This matter should be clearly indicated in an interpretation section if new legislation is considered.

Nowhere in the present Act does it expressly state that possession must be given to the mercantile agent *qua* mercantile agent. But this is the interpretation put upon section 2 by the courts, and it could easily be included in a new measure. Thus in *Pearson* v. *Rose & Young Ltd.*[9] Denning, L.J., observed[10]:

> 'Suppose for instance that the owner of furniture leaves it with a repairer for repair, and that the repairer happens to be a dealer as well, does that mean that the repairer can deprive the true owner of his goods by selling them to a buyer? Clearly not if the owner did not know the repairer to be a dealer, and even if he did, why should that incidental knowledge deprive the true owner of his goods. . . .? The owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent.'[11]

A clear definition of the phrase 'in the ordinary course of business of a mercantile agent' is required. In *Oppenheimer* v.

[7] [1951] 1 K.B. 285, followed in *Du Jardin* v. *Beadman Bros* [1952] 2 Q.B. 712, though here the section requiring interpretation was s. 9 where the word 'consent' is also used.

[8] *Oppenheimer* v. *Frazer & Wyatt* [1907] 2 K.B. 50; *Folkes* v. *King* [1923] 1 K.B. 282; *Lake* v. *Simmons* [1926] 2 K.B. 51, C.A.

[9] [1951] 1 K.B. 285.

[10] At p. 288.

[11] See also *Oppenheimer* v. *Frazer & Wyatt* [1907] 1 K.B. 519 at 527 (*per* Channell, J.); *Staffs Motor Guarantee Ltd.* v. *British Wagon Co.* [1934] 2 K.B. 305 at 313.

Attenborough & Son,[12] Buckley, L.J., rejected the argument of counsel for the plaintiff that the words meant the ordinary course of business of 'a mercantile agent in such a trade as that in which he carries on business,' but said that they meant 'acting in such a way as a mercantile agent acting in the ordinary course of business would act,' *i.e.*, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there was nothing to lead a third party to suppose that anything wrong was being done or to give him notice that the disposition was one which the mercantile agent had no authority to make. Lord Alverstone, C.J., thought that the words meant that the person must act as a mercantile agent would act if he were carrying out a transaction which he was authorised by his master to carry out. With reference to the interpretation of this section the courts have held that it is not in the ordinary course of business for a mercantile agent to get a friend to carry out the transaction with the third party[13] nor to sell a car without a log book.[14]

A new definition of the term 'goods' in relation to the sale of motor cars would appear to be necessary.[15] In the case of some goods a sale can be effected either by the delivery of the goods themselves or by a document of title to them, *e.g.*, by delivery of a bill of lading. It has been held that the log book relating to a car is not a document of title, and that its primary purpose is to show who is the person liable to pay the road fund licence tax in respect of the vehicle.[16] But the Court of Appeal has ruled that a mercantile agent cannot validly sell a car without a log book, *i.e.*, for this purpose 'goods' means car plus log book and the agent must have consent to possession of both.[17]

This decision, however, would appear to lay too much stress on the necessity for a log book, for how is a purchaser, if the car is sold with a log book, to know whether or not consent has been given to the possession of it? Further there is no provision in the Sale of Goods Act, 1893, which prevents the owner of a motor car from selling it without a log book, and there seems to

[12] [1908] 1 K.B. 221.
[13] *De Gorter* v. *Attenborough* (1904) 21 T.L.R. 19.
[14] *Pearson* v. *Rose & Young Ltd.* [1951] 1 K.B. 285.
[15] The present definition is contained in s. 1 (3); documents of title are defined in s. 1 (4).
[16] *Joblin* v. *Watkins & Roseveare (Motors) Ltd.* (1948) 64 T.L.R. 464.
[17] *Pearson* v. *Rose & Young Ltd.* [1951] 1 K.B. 285.

be no good reason why the same rule should not apply to a sale by a mercantile agent. It is suggested that a sale by a mercantile agent without a log book should be valid unless the principal has specifically brought the attention of third parties to the fact that he has limited the agent's authority in such a way as to forbid him to sell the vehicle without the log book. Any sale of a vehicle with a log book which appears to relate to it should be upheld, even if the principal has not given his consent to the agent's possession of it.

INTERNATIONAL SALES

The growing number of reported cases concerning the international sale of goods is a witness to the importance of the subject. Yet it is one which is virtually untouched in the Sale of Goods Act, 1893, and the courts have had to develop the law independently of the statutory provisions. For instance, the terms 'f.o.b.' and 'c.i.f.' are nowhere mentioned, nor is there any reference to the methods of financing international trade by means of the bankers' commercial credit. The draftsman of the Act of 1893 was content to codify the existing law which primarily related to internal trade, and it would now appear desirable to place equal stress on export and import transactions. This would necessitate considerable additions to the present statute, but in this paper attention will be confined to a discussion of those aspects which concern : (a) the duties of the parties under c.i.f. and f.o.b. contracts; (b) the method of payment; and (c) the resale or pledging of the goods or documents of title thereto.

The scope of the duties of the seller under a c.i.f. contract should be clearly set out in the new legislation, which could follow the lines already laid down in the judicial decisions.

Thus the seller must make out an invoice of the goods sold, ship the goods at the port of shipment or buy documents for goods already afloat,[18] and procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. He must then arrange for an insurance policy to be obtained upon the terms current in the trade which will be available for the benefit of the buyers, and finally with all

[18] Scrutton, *Charterparties* (16th ed., 1955), p. 197.

reasonable dispatch send forward the shipping documents to them.[19]

It is not, of course, suggested that the parties should always have to sign a contract which includes terms of this sort, but only that such terms would be implied unless they were expressly excluded. It would not necessarily follow that, merely because a contract was described as a c.i.f. one, the Court would interpret it as such. Thus in the leading case of *Comptoir d'Achat et de Vente du Boerenbond Belge S/A* v. *Luis de Ridder Limitada: The Julia*[20] the House of Lords found that the contract though stated to be a c.i.f. one was really an *ex ship* contract, and the duty of the seller varied accordingly.

As to the shipping documents which the seller must tender, the judicial decisions have established that these must be the invoice, bill of lading and insurance policy, unless these requirements are modified by the terms of the contract[1] whereby, *e.g.*, the tender of certificates of insurance[2] or delivery orders[3] may be considered valid. The bill of lading must be a 'shipped' bill of lading,[4] and a 'received for shipment' one will not suffice, though this rule may be varied by the custom of the trade.[5] The bill of lading must be for the quantity of goods stated in the contract,[6] and must be signed within a reasonable time after shipment.[7] The above requirements operate in favour of holders of the bill of lading for value, and especially of persons with whom the bill is pledged, and it would appear advisable in the

[19] *Johnson* v. *Taylor Brothers & Co., Ltd.* [1920] A.C. 144; *E. Clemens Horst Co.* v. *Biddell Brothers* [1912] A.C. 18; *Sharpe & Co.* v. *Nosawa & Co.* [1917] 2 K.B. 814; *Comptoir d'Achat et de Vente du Boerenbond Belge S/A* v. *Luis de Ridder Limitada: The Julia* [1949] A.C. 293.

[20] [1949] A.C. 293; see also *Tiberghien Draperie Societe a Responsabilite Limitee* v. *Greenberg & Sons (Mantles) Ltd.* [1953] 2 Lloyd's Rep. 739; see also *Holland Colombo Trading Society Ltd.* v. *Segu Mohamed Khaja Alawdeen & Others* [1954] 2 Lloyd's Rep. 273, P.C., and 'The nature of a c.i.f. contract' (1954) 21 *The Solicitor*, p. 271, by the present writer.

[1] *Diamond Alkali Export Corporation* v. *Bourgeois* [1921] 3 K.B. 443.

[2] *Burstall & Co.* v. *Grimsdale & Sons* (1906) 11 Com.Cas. 280; *John Martin of London Ltd.* v. *A. E. Taylor & Co., Ltd.* [1953] 2 Lloyd's Rep. 589.

[3] *Colin & Shields* v. *W. Weddel & Co., Ltd.* [1952] 2 All E.R. 337, C.A.; see 'Delivery Orders' (1952) 19 *The Solicitor*, p. 149.

[4] *Diamond Alkali Export Corporation* v. *Bourgeois* (*supra*).

[5] *Weis & Co.* v. *Produce Brokers' Co.* (1921) 7 Ll.L.R. 211; *United Baltic Corporation* v. *Burgett & Newsam* (1921) 8 Ll.L.R. 190; *Finska Cellulosaforeningen* v. *Westfield Paper Company Ltd.* (1941) 46 Com.Cas. 87.

[6] *Re an Arbitration between Keighley Maxted & Co. and Bryan, Durant & Co. (No. 2)* (1894) 70 L.T. 155.

[7] *Foreman & Ellams Ltd.* v. *Blackburn* [1928] 2 K.B. 60.

new legislation to maintain these strict rules, unless adequate waiver of them has been expressly indicated by the parties. Possibly, however, certificates of insurance should be placed on the same footing as the policies themselves, and should count as a valid tender.

The duties of both the seller and the buyer under a f.o.b. contract could similarly be set out in a new statute, and this would become the standard meaning of the term which would be implied in all cases, unless the parties had expressly provided otherwise. The principles laid down in the reported cases as to the duties of both buyers and sellers could be extracted and codified accordingly.

It has been established that it is the duty of the seller to put the goods 'on board at his own expense on account of the person for whom they were shipped, and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage.'[8] On his part, the buyer is under a duty to nominate a ship at such a time as will enable the seller to bring the goods alongside the ship and put them over the ship's rail.[9] It lies on him to obtain an export licence if one is required.[10] If the buyer fails to nominate an effective ship, the seller's remedy is to sue for non-acceptance of the goods, and not for their price.[11]

The Sale of Goods Act, 1893, s. 32 (3) requires that 'unless otherwise agreed, where goods are sent by the seller by a route involving sea transit under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.' It might have been thought that this subsection does not include a f.o.b. contract because the seller's duty comes to an end when he puts the goods on board the steamer. But the contrary has been ruled by the Court of Appeal.[12] Further, it

[8] *Stock* v. *Inglis* (1884) 12 Q.B.D. 564 at 573 (*per* Brett, M.R.).
[9] *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co., Ltd.* (1922) 28 Com.Cas. 42.
[10] *H. O. Brandt & Co.* v. *H. N. Morris & Co., Ltd.* [1917] 2 K.B. 784; but see *M. W. Hardy & Co. Inc.* v. *A. V. Pound & Co., Ltd.* [1956] 1 All E.R. 639, H.L.
[11] *Colley* v. *Overseas Exporters* [1921] 3 K.B. 302.
[12] *Wimble Sons & Co.* v. *Rosenberg & Sons* [1913] 3 K.B. 743, C.A.; followed in *Northern Steel & Hardware Co., Ltd.* v. *John Batt & Co. (London) Ltd.* (1917) 33 T.L.R. 516.

might have been thought that since the buyer nominates the ship, no notice would be necessary in any event, because the buyer would have all the details available by reason of the terms of the contract in order to effect the insurance. The Court of Appeal has ruled that the subsection means that notice is not required if the buyer has sufficient knowledge even from other sources, *i.e.*, the seller's duty is not absolute.[13] This would appear to be a somewhat strained interpretation of the literal wording of the subsection. It would therefore seem that in the new legislation either the subsection should find no place as being of little value or should be retained but modified and state that no notice is required if the buyer has obtained his knowledge of the position from any source whatsoever.

Now as to the method of payment in international sales. As we have seen, the drafting of the Sale of Goods Act has been carried out with primary reference to the physical delivery of goods by land. Thus section 28 states that the delivery of goods and payment of the price are concurrent conditions. There is no mention of c.i.f. contracts, but the new legislation should enshrine the present practice as established by the judicial decisions. A few examples will suffice. Under this type of contract, unless otherwise agreed, the seller is entitled to payment on presentation of the shipping documents specified in the terms of the contract, the bills of lading representing the goods.[14] The seller is not excused from tendering the documents if the goods arrive safely.[15] The buyer, on the other hand, is bound to pay the price even if the goods are lost on the voyage,[16] or lost at the time of tender of the documents.[17]

Another method of payment is one whereby the seller uses a documentary bill of exchange. The law on this matter is set out in the Sale of Goods Act, 1893, s. 19 (3). which states that 'where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer to secure acceptance or payment of the bill of exchange the buyer is bound to return the bill of lading if he does not honour the

[13] So held by the majority in *Wimble Sons & Co.* v. *Rosenberg & Sons* (*supra*); but see the judgment of Vaughan Williams, L.J., who did not agree on this point: *ibid.*, at p. 751.
[14] *E. Clemens Horst Co.* v. *Biddell Brothers* [1912] A.C. 18.
[15] *Orient Co., Ltd.* v. *Brekke & Howlid* [1913] 1 K.B. 531.
[16] *E. Clemens Horst Co.* v. *Biddell Brothers* (*supra*).
[17] *C. Groom Ltd.* v. *Barber* [1915] 1 K.B. 17; *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.* [1919] 1 K.B. 198.

bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.' But if the seller does use a documentary bill of exchange, he reposes considerable trust in the buyer, for the latter may detach the bill of lading from the bill of exchange, and can pass a good title to the goods to a third party by reason of section 25 (2).[18] This matter might be expressly stated in the new statute.

A further method of payment which is not mentioned in the Act, but which, it is submitted, should find a place in the new legislation, is by means of a bankers' commercial credit.[19] The duties of the mandatory and paying banker should be defined with clarity, especially with regard to the tendering of the exact documents required under the terms of the credit[20] and the acceptance of indemnities if they do not correspond,[1] the meaning of the term 'a clean bill of lading,'[2] and the time when the credit should be made available.[3]

A clear definition of an 'act inconsistent with the ownership of the seller' within the meaning of the Sale of Goods Act, 1893, s. 35, which prevents the purchaser from rejecting the goods, would appear to be required. This could be based on the effect of the reported decisions. Thus if the goods reach their destination and are *delivered* to the sub-purchaser, the Court of Appeal has held that such delivery constitutes an act inconsistent with the ownership of the seller, and the right of rejection is lost.[4]

[18] *Cahn* v. *Pockett's Bristol Channel Steam Packet Co., Ltd.* [1899] 1 Q.B. 643.

[19] See generally A. G. Davis, *The Law relating to Commercial Letters of Credit* (2nd ed., 1954).

[20] *J. H. Rayner & Co., Ltd.* v. *Hambro's Bank Ltd.* [1943] 1 K.B. 37; *Bank Melli Iran* v. *Barclays Bank* [1951] 2 T.L.R. 1057; *Midland Bank Ltd.* v. *Seymour* [1955] 2 Lloyd's Rep. 147.

[1] *Westminster Bank Ltd.* v. *Banca Nazionale di Credito* (1928) 31 Ll.L.R. 306.

[2] *ibid.*; *National Bank of Egypt* v. *Hannevig's Bank Ltd.* (1919) 1 Ll.L.R. 69.

[3] *Pavia & Co., Ltd. S.P.A.* v. *Thurmann-Nielsen* [1952] 1 All E.R. 492, C.A.; *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.* [1952] 1 All E.R. 970, C.A.; *Knotz* v. *Fairclough Dodd & Jones Ltd.* [1952] 1 Lloyd's Rep. 226; *Plasticmoda Societa per Azioni* v. *Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527; *A. E. Lindsay & Co., Ltd.* v. *Cook* [1953] 1 Lloyd's Rep. 328; *Sinason-Teicher Inter-American Grain Corporation* v. *Oilcakes & Oilseeds Trading Co., Ltd.* [1954] 1 W.L.R. 935; *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster* [1955] 1 Lloyd's Rep. 303; *Midland Bank Ltd.* v. *Seymour* [1955] 2 Lloyd's Rep. 147.

[4] *Hardy & Co.* v. *Hillerns & Fowler* [1923] 2 K.B. 490, C.A.; see also *Benaim & Co.* v. *L. S. Debono* [1924] A.C. 514, P.C.; *Pelhams (Materials) Ltd.* v. *Mercantile Commodities Syndicate; MacLeod, Ross & Co., Ltd. (Third Parties)* [1953] 2 Lloyd's Rep. 280.

A similar decision has been reached in a case where the seller had made delivery direct to the sub-purchaser at the request of the purchaser.[5]

In the case of international sales the goods represented by the shipping documents are often sold to sub-purchasers while the goods themselves are at sea. Does such a sale constitute an 'inconsistent act'? Further, in many cases the documents are pledged with a bank; does such a pledge come within section 35?

Neither of these matters is mentioned in the Act, but a *dictum* by Devlin, J., in *Kwei Tek Chao* v. *British Traders & Shippers Ltd.: N.V. Handelsmaatschappij J. Smits Import Export (Third Party)* [6] might well be adopted in any new legislation. This is to the effect that under a c.i.f. contract, what the buyer obtains when the title under the documents is given to him is the property in the goods subject to the condition that they revest in the seller if upon examination they are found to be not in accordance with the contract. That means he gets only conditional property in the goods, and all his dealings with the documents are dealings only with that conditional property in the goods. It follows therefore that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than the conditional property. Therefore neither a resale nor a pledge of the documents is to be regarded as an 'inconsistent act,' and the buyer will still be able to reject the goods themselves.

SALES IN MARKET OVERT

The present law relating to sales in market overt is to be found in the Sale of Goods Act, 1893, s. 22 (1). This provides that 'where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.'

The term 'market overt,' however, is nowhere defined in the Act, and its meaning must be sought from the judicial decisions. Thus it has been said that it must be 'an open public and legally constituted market.'[7] In *Bishopsgate Motor Finance Corpora-*

[5] *E. & S. Ruben Ltd.* v. *Faire Brothers & Co., Ltd.* [1949] 1 K.B. 254.
[6] [1954] 2 Q.B. 459 at 487. But see Halsbury, *Laws of England*, Hailsham ed., Vol. 29, p. 224, para. 297.
[7] *Lee* v. *Bayes* (1856) 18 C.B. 599 at 601 (*per* Jervis, C.J.).

tion Ltd. v. *Transport Brakes Ltd.—Winsor Garage Third Party*[8] counsel contended that a market overt must be created by a charter or grant—something dating from long, long ago—and could not be created by an Act of Parliament. This submission was rejected by the Court of Appeal, Singleton, L.J., saying[9] that he could not see why there should be any such limit, and that he thought that the matter was covered completely by two decisions in the Irish courts.[10] In the country it is only the market place itself in which a valid sale can take place, and then only on market days. A sale in a shop will not be upheld.[11]

On the other hand, in the City of London every shop in which goods are exposed publicly for sale is a market overt for such goods as the owner professes to trade in.[12] Thus Smithfield has been held not to be a market overt for clothes, but only for horses and cattle. Every day except Sunday is regarded as a market day.[13]

The sale must be made in a place that is overt and open, not in a back room or warehouse.[14] The contract must be originally and wholly made in the market.[15] This is to give the fullest opportunity to the owner of the goods 'to make pursuit of them, and prevent them from being sold.'[16] The sale must not take place at night but only between sunrise and sunset, the reason for this being that when a charter is given to a person to hold a fair or market on certain days, 'day' for this purpose means a solar day and not a day of twenty-four hours.[17] If goods belonging to the Crown are sold in market overt, the purchaser does not get a good title to them.[18] The right of the original owner revives if the original seller who sold without title again acquires the goods.[19] Further it has been held that a

[8] [1949] 1 K.B. 322.
[9] At p. 334.
[10] *Ganly* v. *Ledwidge* (1876) I.R. 10 C.L. 33; *Delaney* v. *Wallis* (1883) 14 L.R. Ir. 31.
[11] *L'Evesque de Worcester's Case* (1594) Moore 360; Bac. Ab. 'Fairs and Markets (E)'; *Lee* v. *Bayes* (1856) 18 C.B. 599 at 601 (*per* Cresswell, J.).
[12] *L'Evesque de Worcester's Case* (*supra*). See also *Marner* v. *Banks* (1867) 17 L.T. 147.
[13] Bac. Ab. 'Fairs and Markets (E).'
[14] Co. 2 Inst. 713 *Hargreave* v. *Spink* [1892] 1 Q.B. 25.
[15] Co. 2 Inst. 713.
[16] *Crane* v. *London Dock Co.* (1864) 33 L.J.Q.B. 224 at 229.
[17] Co. 2 Inst. 713.
[18] *ibid.*
[19] *ibid.*

sale by sample is not a sale in market overt.[20] No title passes if the seller is a child of tender years.[1] To bring a transaction within the rules of market overt the sale must be made *by* the shopkeeper, they do not extend to sales *to* him.[2]

According to Sir Edward Coke the underlying reason for the protection of the title of purchasers of goods in market overt was that 'the common law did hold it for a point of great policie, and behovefull for the common-wealth, that faires and markets overt should be replenished and well furnished with all manner of commodities vendible in faires and markets for the necessary sustentation and use of the people. And to that end the common law did ordaine (to encourage men thereunto) that all sales and contracts of any thing vendible in faires or markets overt should not be good onely between the parties, but should bind those that right had thereunto.'[3] Nowadays, however, trade has shifted away from the market place to the retail shops, and the question arises as to whether the special status of a sale in market overt serves a practical and useful purpose at the present time.

Why, for instance, should a purchase in a shop in the Strand not be protected while one in a shop in Fleet Street is? Possibly, some sympathy can be felt for the continuance of upholding sales in market overt in the country in old established market places, but the retail trade of the shops in the City of London has now left it for the more spacious premises available in the West End and elsewhere. As we have seen a market overt appears to come into operation by grant or charter or statute. But if the category of market overt is to be retained, can new markets be recognised by the law, if it becomes the custom of traders to buy and sell particular types of goods in places which could not strictly speaking be called market places, *e.g.*, the Warren Street motor car market? Or must trade be for the future confined to the old established markets?

It may be said that a sale in market overt in the country where goods are exposed for sale on stalls gives the real owner some opportunity of being able to track down his property before it is sold. But can the same be said of a sale in a retail shop?

20 *Hill* v. *Smith* (1812) 4 Taunt. 520.
1 Co. 2 Inst. 713.
2 *Hargreave* v. *Spink* [1892] 1 Q.B. 25; *Ardath Tobacco Co., Ltd.* v. *Ocker* (1930) 47 T.L.R. 177.
3 Co. 2 Inst. 713.

The Elizabethan idea of a sale in market overt was that passers-by could be able to see into the shop concerned, *e.g.*, if the sale took place behind a hanging or cupboard.[4] But the window-dressing arrangements of the modern type of shop are quite as effective concealers of a sale as a hanging or cupboard, and a passer-by cannot see into many of them. A change in the custom to conform with this practice seems to be indicated in the cases in the nineteenth and twentieth centuries, and it has been said that 'the shop in London must be one in which goods are openly sold, *i.e.*, where they are sold in the presence and sight of the public who may come into the shop upon legitimate occasion. The keeping shop is an invitation to any one who chooses to come to deal with the shopkeeper to enter.'[5] In the old days it might have been possible for an owner to trace his property, for he would be able to go to those shops which specialised in the sale of goods similar to his own, but this is now less likely in the era of departmental stores which deal in great varieties of goods. The term 'shop' has been the subject of a number of decisions, and in one case was held not to apply to auction rooms, and the opinion was expressed that there was no good reason for extending the custom to them, for they were largely devoted to the prompt sale of unredeemed pledges and after a very limited public exhibition and very slight description in advertisements and catalogues.[6] Possibly, however, it might be urged that some auctions are just as public as a sale in a shop, and the owner has quite as much opportunity of tracing his goods in the one as in the other.

One particular anomaly relating to sales in market overt is that if goods have been stolen and are then sold in market overt, the title of all intermediate buyers and sellers will be divested if the thief is prosecuted to conviction.[7] But the property does not revest in the former owner by reason only of the conviction of the offender, if the goods have been obtained by fraud or other wrongful means not amounting to larceny.[8]

[4] Com.Dig. Market (E).
[5] *Hargreave* v. *Spink* [1892] 1 Q.B. 25 at 26 (*per* Wills, J.). See also *Lyons* v. *De Pass* (1840) 11 A. & E. 326; *Clayton* v. *Le Roy* [1911] 2 K.B. 1031.
[6] *Clayton* v. *Le Roy* [1911] 2 K.B. 1031 at 1044 (*per* Scrutton, J.).
[7] Sale of Goods Act, 1893, s. 24 (1).
[8] *ibid.*, s. 24 (2).

To sum up, there seems little justification for the retention of shops in the City of London within the principle of market overt, but possibly a case can be made out for the preservation of titles obtained in market overt elsewhere, but this should be extended to all markets *de facto*. Possibly auctions could well be placed on the same footing provided that the necessary element of publicity is present. The titles of intermediate sellers should not be interfered with even if the thief is convicted.

8

SECURITY OF TENURE UNDER THE LANDLORD AND TENANT ACT, 1954

E. H. Scamell

By far the most important developments which have taken place recently in the law of landlord and tenant have been the result of activity on the part of the Legislature. There can be few branches of the law which have so frequently been honoured by the Legislature, not with a view to simplifying or improving the law but with a view to solving certain social and economic problems to which the relationship of landlord and tenant has given rise. Thus, to give a few illustrations, the Small Holdings and Allotments Act, 1908, the Allotments Act, 1922, the Agricultural Holdings Act, 1923, the Law of Property Act, 1925, the Landlord and Tenant Act, 1927, the Housing Acts, 1936–1949, the Leasehold Property (Repairs) Act, 1938, and the Agricultural Holdings Act, 1948, not to mention the legion Rent Restriction Acts which were passed between 1915 and 1954, were all directed towards improving the lot of the tenant and inevitably resulted in fettering the hand of the landlord. Landlords have from time to time sought methods of evading some of the consequences of this legislative activity, and not without some success. Thus, the Agricultural Holdings Act, 1923, related to tenancies from year to year which were the common type of tenancy in the case of agricultural land. In *Land Settlement Association Ltd.* v. *Carr*[1] there was a letting of agricultural land for 364 days and thereafter for successive periods of 364 days until determined by notice. It was held that this was not a letting from year to year but only for successive parts of a year and that therefore the letting fell outside the Agricultural Holdings Act of 1923. This particular device for evading the agricultural code has been thwarted by section 2 of the Agricultural Holdings Act, 1948, which provides that a letting of agricultural land for less than a year shall take

[1] [1944] K.B. 657.

effect as a letting from year to year unless the letting is approved by the Minister of Agriculture and Fisheries before the creation of the letting.

Another illustration of this sort of evasion was provided quite recently in the case of *O'Connor* v. *Hume*.[2] Section 12 (7) of the Rent (Restrictions) Act, 1920, provides that the Rent Acts shall not apply to any tenancy where the rent is below two-thirds of the rateable value. By a tenancy agreement the landlord in this case let a cottage to a tenant at 2s. per week, but in addition took a premium of £47 in respect of the first twelve months of the tenancy. At the end of the twelve months the landlord gave the tenant notice to quit, but the tenant refused to give up possession, claiming protection as a statutory tenant under the Rent Restriction Acts. It was contended by the tenant that the real bargain was that the rent should be £1 a week, although as to £47 it had been capitalised. The Court of Appeal held, however, that the tenant could not go behind the tenancy agreement and that since the rent of 2s. was less than two-thirds of the rateable value of the cottage, the tenant could not claim the protection of the Acts.

Cases such as these show that notwithstanding the social purpose behind much of the modern landlord and tenant legislation, the courts still refuse to recognise any principle of public policy which would render specious attempts at evasion unlawful. They would, indeed, be usurping the function of the legislature if they did recognise any such principle.

In February, 1948, the Lord Chancellor appointed a Committee to consider and report on various matters affecting leasehold property in England and Wales including the question whether legislation should be introduced making provision for the compulsory enfranchisement of leaseholds. In June, 1950, the Committee presented their Final Report[3] which was not, however, unanimous. Of the ten members of the Committee, only two were in favour of a scheme of enfranchisement of leaseholds, and this only on a limited scale, but the Committee was unanimous in proposing that the security of tenure already provided by the Rent Acts in the case of certain tenancies of dwelling-houses should be extended. The Leasehold Property (Temporary Provisions) Act, 1951, was passed as an interim measure and its

[2] [1954] 1 W.L.R. 824.
[3] Cmd. 7982.

effect was to extend until Midsummer, 1953, on existing terms and conditions any long lease (*i.e.*, for more than twenty-one years) due to expire before that date, of a house occupied by the lessee or his family and to give tenants of shops, whose tenancies would expire before Midsummer, 1953, a right to apply to the county court for a renewal not exceeding one year at a time. The operation of this Act was subsequently extended to cover the period which elapsed before the passing of permanent legislation.

The Landlord and Tenant Act, 1954, was passed to give substantial effect to most of the recommendations of the Majority Report of the Leasehold Committee, and it is quite clear that for the time being at least, the question of leasehold enfranchisement has been shelved. It is interesting to note, however, that as if in anticipation of the ultimate conversion of all leaseholds into freehold estates, the practice of granting freehold estates in flats is rapidly spreading and in fact the flats in several blocks of flats which have recently been constructed in London, have been disposed of in this way. A number of technical problems arise in connection with the conveyance of a freehold estate in a flat with regard, in particular, to the enforcement of positive covenants contained in the conveyance, and from this point of view, it is, perhaps, a pity that the legislature has not seen fit to intervene and apply the rules relating to covenants contained in a lease to covenants contained in conveyances of freehold estates, for I feel certain that if this were done, the lease would tend automatically to give way to the freehold estate until a point might eventually be reached when it became no longer necessary to consider the question of enfranchisement. In the meantime, however, the fact remains that so far as the enforceability of positive covenants is concerned, the lease scores every time over the out-and-out conveyance and it is therefore likely to be preferred to the freehold estate for some time to come whenever questions of estate development arise.

Turning now to the Landlord and Tenant Act of 1954, the main object of the Act is to protect the right of occupation of long leaseholders of houses and tenants of business premises and I propose to outline, as simply as possible, how the Act works.

PART I OF THE LANDLORD AND TENANT ACT, 1954

Part 1 of the Act deals with security of tenure for residential tenants. As I have had occasion to mention earlier, the Rent Restriction Acts give a tenant security of tenure only if the rent payable under the tenancy is less than two-thirds of the rateable value of the dwelling-house.[4] In the case of *most* short residential leases, the rent will be more than two-thirds of the rateable value; but in the case of leases granted for a long term of years, it has been the common practice, in many cases, for landlords to require a premium and to reserve a small ground rent only, and accordingly, tenants holding under such leases would fall outside the Rent Acts and would enjoy no security of tenure. The 1954 Act has altered this position in the case of certain tenancies, though the position is not so simple (if that be an appropriate word) as under the Rent Acts.

It is first necessary to consider to what tenancies this part of the Act applies. The answer is that it applies to any tenancy which satisfies the following conditions:

(1) It must originally have been granted for a term of more than twenty-one years.

(2) It must have been granted at a low rent, that is, at a rent which is less than two-thirds of the rateable value. Thus, if the tenancy were simply granted in consideration of a premium without *any* rent being reserved the Act would apparently not apply. Such a tenancy is uncommon but not by any means unknown and this seems to me to be a *casus omissus*.

(3) The circumstances must be such that had the tenancy not been at a low rent (*i.e.* less than two-thirds of the rateable value) the tenant would have been entitled under the Rent Acts to retain possession of the whole or a part of the property comprised in the tenancy. This condition will only be satisfied if (*inter alia*) the following conditions are satisfied: (1) the property is within the limits of rateable value mentioned in the Rent Restriction Acts (*i.e.*, £100 in London and £75 elsewhere as at the appropriate date). It is estimated, however, that over 90 per cent of the dwelling-houses in England and Wales are within these limits of rateable value, so that it will only be exceptionally that a property will not qualify.[5] (2) The tenant must be in actual

[4] See *O'Connor* v. *Hume* [1954] 1 W.L.R. 824.
[5] See Cmd. 8713, para. 34.

occupation of the premises at the date of termination of the long lease, *and* after two months following the service of the notice. Under the present law, long leases of premises which are constructed or converted after August 30, 1954, will not fall within the protection of the 1954 Act, since the Rent Acts themselves do not apply in respect of such premises.

To avoid the use of cumbersome language, I propose to refer to tenancies which satisfy the above three conditions simply as 'long leases.'

When the date of expiry of such a long lease arrives, then apart from the 1954 Act, the tenant would ordinarily be bound to give up possession forthwith, but section 3 of the Act provides that notwithstanding that the date of expiry has passed, the lease shall continue *at the same rent and upon the same terms* as before the date of the expiry unless and until either the landlord (as defined by section 21 of the Act) or the tenant, gives a proper notice to determine the lease. This section therefore puts the onus on one or other of the parties to the lease to take positive steps to bring it to an end and if no such steps are taken the lease will continue indefinitely.

The tenant may determine the lease at any time by serving on the *immediate* landlord (not necessarily the section 21 landlord) not less than one month's notice in writing. It is unlikely, however, that a tenant will often take the initiative because he will ordinarily obviously be quite happy to sit tight paying the ground rent only. The effect of section 3 is, to all intents and purposes, to place the onus upon the landlord to bring the lease to an end because it is he who stands to lose as a result of the prolongation of the lease, at the same rent and on the same basis as before. If *he* wishes to terminate the lease, however, he must give the tenant at least six months' notice in writing in the prescribed form specifying the date of termination (section 4 of the Act).

If the landlord chooses to serve such a notice, that is far from being an end of the matter. Section 4 (3) provides that the notice must either:

(a) Contain proposals for what is defined by section 7 (3) of the Act as a statutory tenancy or

(b) Contain notice that if the tenant is unwilling to give up

[6] The Housing Repairs and Rents Act, 1954, s. 35.

possession in accordance with the notice, the landlord proposes to apply to the court on one or more of the grounds mentioned or referred to in section 12 of the Act, for possession of the property.

The only grounds upon which the landlord may apply to the court for possession of the property are the grounds specified in the Third Schedule to the Act (which correspond, subject to the necessary modifications, to the grounds on which a court may make an order for possession under the Rent Acts) or that for the purposes of redevelopment the landlord proposes to demolish or reconstruct the whole or a substantial part of the premises. In the main, the grounds upon which the landlord is likely to recover possession are :

(1) If he can show that suitable alternative accommodation would be available for the tenant at the date of termination of the tenancy.[7]

(2) If the tenant has failed to comply with any term of the tenancy as to payment of rent or rates or as to insuring or keeping insured any premises.

(3) If the tenant is causing a nuisance or annoyance to adjoining owners.

(4) If the landlord can show that the premises are reasonably required for occupation as a residence for himself or any son or daughter of his over 18 years of age or for his father or mother provided, however, that the landlord cannot rely on this ground if he is a landlord by having purchased after November 1, 1950. Unless, therefore, he is likely to succeed on one of these grounds, the landlord is bound, in his notice terminating the lease, to make proposals for a statutory tenancy, the rent and terms of which must be agreed between the landlord and tenant or in default of agreement, determined by the county court. Once created, the statutory tenancy will continue on foot until the tenant or his successor in title ceases to retain possession of the dwelling-house *by virtue of the Rent Acts.*

The value of a statutory tenancy from the landlord's point of view is that it will ensure that instead of the ground rent, he will get an economic rent, but nevertheless a landlord should think hard before serving the necessary notice because it would appear that by virtue of section 6 (2) of the Act, once a landlord has

[7] See on this *Scrace* v. *Windrot* [1955] 1 W.L.R. 475.

served a notice under the Act in respect of a tenancy originally created for more than twenty-one years, then whether or not the tenancy was a long lease in the sense which I have described earlier, and if the tenant elects to retain possession, the landlord is apparently estopped from denying that the tenancy is a long lease to which the Act applies. If this is so, then section 2 (1) must be regarded as extended by section 6 (2).[8]

PART II OF THE LANDLORD & TENANT ACT, 1954

This Part of the Act deals with security of tenure for business, professional and other tenants. In this sphere, the Legislature has endorsed the unanimous view of the Leasehold Committee that the conception of 'statutory tenant' and 'standard rent' which are the basis of the Rent Restriction Acts should *not* be applied to business premises. Nevertheless, the initial approach to the problem is the same in that unless active steps are taken by either the landlord or the tenant, any tenancy to which this Part of the Act applies will continue indefinitely.

This Part of the Act applies to any tenancy, including even a tenancy-at-will,[9] where the property comprised in the tenancy is or includes premises which are occupied by the tenant for the purposes of a trade business or profession carried on by him (section 23 (1)). Generally speaking, however, although a tenancy at will has been held to be within this Part of the Act, a term certain not exceeding three months is excluded (section 43 (3)). In a recent case[10] it has been held that the holding, managing and letting of flats is not a 'business' within the meaning of the section. Further, section 43 (1) of the Act excludes agricultural holdings, mining leases and certain tenancies of premises with off-licences.

Section 24 (1) of the Act provides that business tenancies within section 23 shall not come to an end unless and until terminated by a notice to terminate the tenancy given by the landlord or by the tenant making a request for a new tenancy. If the landlord[11] wishes to terminate the tenancy he must[12] give

[8] See also the proviso to s. 7 (2).
[9] *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714.
[10] *Bagettes Ltd.* v. *G.P. Estates Co., Ltd.* [1955] 3 W.L.R. 602; *aff.* on appeal.
[11] As defined by s. 44 (1); see *Diploma Laundry* v. *Surrey Timber Co.* [1955] 3 W.L.R. 404.
[12] 'May' in s. 25 (1) was interpreted as meaning 'must' in *Orman Bros.* v. *Greenbaum* [1955] 1 W.L.R. 248.

the tenant at least six months' notice in writing in the prescribed form specifying the date at which the tenancy is to come to an end. This notice must (*inter alia*) require the tenant within two months to notify the landlord in writing whether or not the tenant will be willing to give up possession of the property. If the tenant wishes to obtain security of tenure he must then do two things[13]:

(1) Notify the landlord within two months that he will not be willing to give up possession as required and

(2) In the third or fourth month after receiving the landlord's notice apply to the court for the grant of a new tenancy comprising the property (section 2 (*a*)).

Where the tenant makes such an application the court may make an order for the grant of a new tenancy on such terms as may be agreed or in default of agreement as may be determined by the court to be reasonable in all the circumstances but the period of the new tenancy must not exceed fourteen years (sections 33, 34 and 35). In *Upsons Ltd.* v. *E. Robins Ltd.*[14] the county court judge had regard to 'all the circumstances' and granted a new tenancy to a business tenant for a period of one year only. On appeal, the Court of Appeal held that the judge was acting quite properly in taking into account (1) the fact that the landlord (a company) wished to occupy the premises itself, (2) the fact that the tenant was a company owning 250 shops, (3) the fact that the landlord owned only one shop and (4) the fact that the tenant had occupied the shop since 1937.

The landlord may oppose an application for a new tenancy on any of the grounds specified in section 30 of the Act and if he establishes any of those grounds to the satisfaction of the court, the court is precluded from making an order for the grant of a new tenancy, but subject to certain limitations (including the possibility of the landlord having contracted out) the tenant will become entitled, on quitting the holding, to be paid compensation by the landlord.[15] It is not clear from the Act, but it would appear that if the tenant once obtains a new tenancy, then however short the period, he loses all right to compensation under these provisions. This may be a factor to be taken into account by the court in fixing the period of the new tenancy.

[13] Unlike tenants under Part 1, the onus is thus on the tenant.
[14] [1955] 3 W.L.R. 584.
[15] See ss. 31, 37 and 38 of the Act.

In the event, however, of the landlord not serving a notice on the tenant to terminate the tenancy, the tenant can only apply to the court for a new tenancy where the tenancy under which he holds for the time being is a tenancy granted for a term of years certain exceeding one year or granted for a term of years certain and thereafter from year to year (section 26 (1)). Whether or not the tenant so qualifies, however, his original tenancy will be perpetuated under section 24 of the Act subject to his right to terminate it by three months' notice in writing.

CONCLUSION

The effect of the 1954 Act and earlier legislation is that by far the greater number of tenants of premises, whether residential or business, enjoy a very considerable measure of security of tenure. It is suggested that in preserving the relationship of landlord and tenant but ridding it of its worst vice—insecurity—the Legislature has steered a wise course. The Act does, in effect, represent a logical extension of the option to renew which had already begun to be common form in business tenancies. As has so often happened, the Legislature has carried on where conveyancers have stopped. The leasehold estate still enjoys a measure of flexibility for which there is no *counterpart* in the freehold estate, and properly controlled, as it promises to be, it still has an important role to play.

9

THE CONTROL OF MONOPOLIES AND RESTRICTIVE TRADE PRACTICES

VALENTINE LATHAM KORAH

WHEN I chose this problem last summer, I little realised how current it would be. Although the bill[1] has received a second reading, it will doubtless emerge from the Committee stage on the floor of the House,[2] in a somewhat different form. So I intend, in this paper, to consider the existing position at common law, the recommendations of the Monopolies Commission Report,[3] the main provisions of the bill and some of the rules evolved in other countries, so that discussion of the current legislation can be viewed with some other solutions in mind.

The problem is by no means a new one in this country. As early as Magna Carta the prerogative of the Crown to grant monopolies had to be checked. Under the Tudors, these checks were more honoured by their breach, so that in 1623 the Statute of Monopolies was passed, declaring that all monopolies, even if granted previously 'are altogether contrary to the Laws of this Realm, and so are and shall be, utterly void and of none effect and in no wise to be put in Ure or Execucon,'[4] subject to the liberty granted to the Crown to grant a patent lasting for fourteen years for new inventions.[5]

THE COMMON LAW

The common law also attacked contracts in restraint of trade. Contracts which prevented a man from exercising the trade of his choice were scrutinised and only if they were necessary to protect

1 Restrictive Trade Practices [99], February 15, 1956.
2 House of Commons Debates 1956, Vol. 551, Cols. 224 *et seq.*, 397 *et seq.*
3 The Monopolies and Restrictive Practices Commission—Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices, June, 1955, Cmd. 9504. It was debated in both Houses: House of Commons Debates, 1955, Vol. 543, Col. 946; House of Lords Debates, 1955, Vol. 193, Col. 1134.
4 Section 1.
5 Section 6. The power has since been extended by the Patents and Designs Acts, 1907–1949.

the trade secrets or goodwill of a former master or prospective purchaser, were such contracts enforced. This rule of public policy was largely to ensure a sufficient supply of skilled men for the benefit of the consumer. But in time the public interest aspect of the rule came to be eclipsed, and in cases between vendor and purchaser, where the parties were on roughly equal terms, almost any provisions were enforced.[6] Indeed, as the only way of realising the value of goodwill on retirement is to promise not to compete, one of the incentives to business energy and drive would be lost if such contracts were not allowed. And indeed many ways to evade a prohibition could be found, by means of patents and companies.

However, the Courts did not stop there: in the *Mogul Case*[7] an attempt to monopolise a market was protected.[8] The Far East tea shippers formed an association in order to keep up freight rates. To prevent competition from the defendants, a rival firm, the members of the association combined to lower freights by offering rebates to such shippers as consigned cargoes exclusively on the association's ships. The House of Lords held that a combination of trade to offer favourable prices, discounts or other facilities making it unprofitable for rivals to compete was not unlawful if it was in furtherance of legitimate trade interests. Bowen, L.J., said in the Court of Appeal: 'The instinct of self-advancement and self-protection . . . is the very incentive to all trade. To say that a man is to trade freely, but is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.'[9]

Perhaps the basic trouble is the conflict between the principles of freedom of contract and association, of free competition, and of improvement of industrial and commercial efficiency, reflected in the high standards and steady, low prices. The depression of the 'thirties with its cut-throat methods, demonstrated that free competition is not self-perpetuating. To force competitors to leave his field, each producer will try to lower his prices, often by selling at a loss, which he will recover from the higher prices he will be able to charge when he has a monopoly. But should new competitors

[6] See the discussion by Devlin, J., at p. 6, *supra*.
[7] *Mogul Steamship Company Ltd.* v. *McGregor & Others* [1892] A.C. 25.
[8] See also *Thorne* v. *Motor Trade Association* [1937] A.C. 797.
[9] (1889) 23 Q.B.D. 598 at 615.

come in at that stage, they will find that meanwhile he has amassed a great deal of technological knowledge and experience, and perhaps patents and trade marks, which make entry into the market hazardous and costly. Even if the producer was unable to force out his competitors, the consumer is likely to suffer from large fluctuations in price. The producers will do so too, and may have to undermine their capital replacement programmes, and perhaps even the quality of their goods or services. Since production must be in advance of demand, fluctuations in it, resulting from price fluctuations, are harmful, especially nowadays when so much capital is tied up when manufacturing capacity is idle.

THE MONOPOLIES COMMISSION

In 1948 the Labour Government established the Monopolies Commission,[10] to which the Board of Trade might refer the question of restrictive practices in particular industries. The general idea was that the Commission should investigate these, and issue a report to the Board of Trade. As a result of their first report on dental goods, an order[11] was made by the Minister prohibiting certain collective practices in the supply of dental goods, but since that date, although the fact finding prowess of the Commission seems to be fairly generally praised,[12] no orders have been made as a result of the reports. Sometimes the mere publicity given to restrictive practices has been sufficient to modify their use. In several reports made on the different branches of the economy, similar practices were found to exist, although they differed considerably in their details. Certain practices, therefore, classified by the commission into six categories, were referred to it. The majority found that competition in many branches of trade and industry has given way to a network of privately organised controls. But the Commission was

[10] Monopolies & Restrictive Practices Act, 1948. Under the Monopolies and Restrictive Practices Commission Act, 1953, the size of the Commission was increased and its chairman may direct a group of not less than five members thereof to undertake a particular inquiry. This has undoubtedly added to the number of reports since made.

[11] Monopolies and Restrictive Practices (Dental Goods) Order, S.I. 1951/1200.

[12] Except on the score that it does not reveal the evidence on which its reports are based, nor always allow cross-examination. This, it is claimed, is a denial of justice, in that businessmen may not know the case they have to answer.

not unanimous in its proposals for reform. The majority report first pointed out[13] that under its terms of reference, it was concerned only with collective agreements and not with restrictive practices adopted by single firms, however large. While not being prepared to say that all restrictive collective agreements were necessarily contrary to the public interest, they were 'satisfied that all the types of agreements we have examined do adversely affect the public interest, some to a considerably greater degree than others.'[14] They were particularly impressed 'by the effect of a binding and collective obligation in preventing manufacturers or distributors from experimenting and from trying out new or different ways of conducting their business. Such obligations create an undue rigidity which may affect the numbers and kinds of concerns engaged in a trade, the trading methods adopted by those established in the trade and the level of prices both generally and to different classes of buyers.'[15] After shortly noting the findings, set out earlier in the report, as to some of the classes of restrictive practices they had considered, the majority continued: 'We have considered whether there may be circumstances in which our conclusion that the practices with which our reference is concerned are generally against the public interest may not hold good. We have not in the course of our inquiry come across any instances in which we were clearly satisfied that such practices were beneficial. However, it would have been impossible for us to consider in detail all such arrangements and in some of the cases which came to our notice these practices formed only part of more complex arrangements, going beyond the scope of the present inquiry, whose total effect on the public interest we were not in a position to judge. We cannot, therefore, conclude that there should be no exceptions to our general conclusion. It appears to us that the exceptional use of practices of these kinds might be justified, subject to safeguards to avoid any restrictive effects which were not directly necessary to deal with the particular problems involved,'[16] (1) where final consumers are unable to judge the standard of service to be expected from distributors, in the rare case where this is not

[13] Para. 232.
[14] Para. 233.
[15] Para. 234.
[16] Para. 240.

dealt with by special legislation, (2) where exclusive buying or selling arrangements are designed to protect an industry of strategic importance, or particularly liable to competition from dumped imports, where tariffs, *etc.* were not practicable, (3) a few cases of common price agreements, and (4) where arrangements are necessary to enable smaller concerns in a trade to compete with a very large firm in the same trade, which is itself using restrictive practices.

Fortunately the majority deliberately went outside their terms of reference [17] in suggesting two possible types of legislation to deal with the matter. It was clear that the powers now available to the government were insufficient to implement the Commission's conclusions, and that further legislation would be necessary. 'Such legislation might take either of two possible forms. One would be to ensure a measure of publicity and supervision by requiring all agreements falling within the scope of our reference to be registered, and then to prohibit such of them as after individual scrutiny were not found to be in the public interest. The alternative would be to prohibit generally by statute all agreements covered by our reference, with provision for exceptions in particular cases.

'If the first method were adopted [as it has been in the bill], the legislation would presumably require all agreements of the kinds with which we have been dealing in this reference, and which would have to be precisely defined in the Act, to be registered, . . . the register being open to public inspection. The Minister responsible would be empowered to refer any agreement on the register to an independent body for scrutiny and advice and to prohibit by Order agreements which were not found after such scrutiny to be in the public interest. The Act would lay down certain criteria, including for example those considered . . . (earlier in the report),[18] to be taken into account in judging the public interest.' [19]

The Commission hoped that the publicity given to agreements by such a procedure might lead to their modification or abandonment.

However, they thought that this would be insufficient, as

[17] Para. 241.
[18] Para. 240, p. 144, *supra.*
[19] Paras. 242–243.

further individual review of agreements, most of which would be against the public interest, would take a long time and so lead to unfairness. Since such practices usually operate against the public interest, they should be generally prohibited. But where a *prima facie* case was established, an inquiry might be held, to decide whether to exempt a particular agreement.

However, as this would create a new criminal offence, the condemned practices considered contrary to the public interest would have to be clearly defined—no easy task. In the Commons debate, the desirability of convicting respected businessmen for such offences was questioned. In Canada, the United States,[20] Austria and other countries such prosecutions are brought, but it is doubtful whether criminal sanctions are appropriate to marginal deviation from desired standards.[1]

To cover the cases where restrictive practices might be in the public interest provision should be made for application for exemption to some tribunal, which should consider whether the case falls within one of the exemptions mentioned earlier and whether it would operate in the public interest.[2]

However three members of the Commission[3] wrote a dissenting conclusion. They were 'not prepared to say that the referred practices as they exist over a very wide field of trade and industry are in general injurious to the public interest and should be prohibited and made illegal by statute even with the possible exceptions' mentioned. 'Nevertheless we recognise that the practices . . . may, because restrictive of competition, in certain circumstances be injurious to the public interest. . . . Economic circumstances may change and a practice which today is thought contrary to the public interest may in tomorrow's conditions appear justifiable. A general statutory prohibition seems to us to create a degree of inflexibility in the law which might in the future prove undesirable.'[4] They therefore supported a system of registration. 'Firstly the publicity entailed would itself be salutary and secondly the register would form the basis for the

[20] Though even in the United States, there is doubt whether criminal sanctions are appropriate to such flexibly defined offences as an attempt to monopolise. *E.g.*, K. S. Carlston, *Law & Structures of Social Action*, (1956), pp. 197, 201.

[1] p. 155 *infra*.

[2] Para. 250.

[3] Sir Thomas Barnes, Mr. Davidson and Professor Goodhart.

[4] Paras. 255–258.

selection of agreements for the detailed examination of their operation which in our judgment would alone warrant a positive decision that a particular arrangement was operating against the public interest and should be prohibited.

'Trade associations and others concerned with these matters will no doubt review their collective agreements in the light of the views expressed in the report.' [5]

They [5a] continued by disagreeing with the majority finding that collective arrangements for the enforcement of resale prices prescribed by individual manufacturers in general operate against the public interest. They agreed that agreements between manufacturers and distributors for fixing the resale price of goods are likely to do so. But where each manufacturer fixes a resale price for his goods, and manufacturers agree reciprocally to enforce each other's prices, since the fixing of individual prices was not within their terms of reference, they saw nothing against the collective enforcement of a lawfully made agreement. A retailer selling below the prescribed price, to which he has agreed, deserves no sympathy. 'We regard the greater effectiveness (which is accepted by our colleagues) of collective enforcement, as distinct from individual enforcement, as a powerful argument in its favour. It seems to us illogical that, if it is lawful for individual manufacturers to prescribe the prices at which their goods must be resold . . . they should be debarred from enforcing the maintenance of the prescribed prices in the most effective manner consistent with the general law.

'It should also be borne in mind that to forbid collective enforcement of resale price maintenance favours the large manufacturer, who by his own individual action can probably go a long way to enforce individually his own contracts by withholding supplies, whereas the small manufacturer seeking to enforce his contract by withholding supplies of his goods cannot do this in a competitive market without serious risk to his own trade.

'Much of the public uneasiness on this matter arises from a feeling that the recalcitrant trader is made the subject of some sinister "Star Chamber" procedure. We do not think that uneasiness on this score is well-founded. The "Star Chamber" notion

[5] Paras. 259–260.
[5a] As did also Mr. C. H. P. Gifford.

arises from the existence of informal tribunals where the trader is given a hearing before any decision to apply sanctions to him is taken. Where such tribunals exist, the evidence goes to show that considerable trouble is taken to ensure that their procedure is fair and in conformity with the law. In our view there is more reason to be uneasy where no tribunal exists, but even there we are not satisfied that in any case brought to our attention the decision was wrong on the facts.'[6]

This discussion of retail price maintenance, which ends the minority report, brings out the difficulties facing the commission under their terms of reference. They were to consider only agreements as to restrictive practices between two or more persons. Such agreements can be avoided by merging the parties in a company, or by buying up the assets of rivals and employing their personnel. To deal with restrictive agreements and not with monopolies is to take but half the cherry in one bite. The minority do not consider whether individual enforcement by a large firm of its own retail prices is desirable—their terms of reference did not ask them to do so. Yet in many countries where restrictive practices are controlled, such practices are banned.[7] That may of course lead to 'loss leader' selling or some 'fighting brand' may be sold at cut prices, until rivals leave the field, and then production of the original article is continued at the old price. However, such practices can be curtailed by some antimonopoly law.

THE RESTRICTIVE TRADE PRACTICES BILL

The bill[8] seems to be a compromise between the views of the majority and minority reports. The idea of registration, favoured by the minority, and considered by the majority is to be introduced. Under clause 5, five classes of agreements or arrangements between two or more persons are defined and cover most of the types of restrictive agreements now discoverable in trade or industry. Such agreements must be registered from such time as the Board of Trade may appoint, either in regard to particular types of arrangements,[9] or particular trades, or otherwise.[10] The

[6] Paras. 266–268.
[7] See p. 154, *infra*.
[8] Restrictive Trade Practices, H.C. [99] of 1956.
[9] It seems that price rings and level tendering will be among the first type of arrangement to be registered (Mr. Thorneycroft, House of Commons Debates, March 6, 1956).
[10] Clause 7.

names of the parties to any arrangement and its terms must be sent in writing[11] to the Registrar of Restrictive Trading Agreements to be appointed by the Queen[11a] and independent of the Board of Trade.[12] The Register shall be public, apart from one section containing matter 'the publication of which would in the opinion of the Board (of Trade) be contrary to the public interest'; and '. . . particulars containing information as to any secret process of manufacture or as to the presence, absence or situation of any mineral or other deposits or as to any other similar matter, being information the publication of which, in the opinion of the Board, would substantially damage the legitimate business interests of any person.'[13] The Registrar, if he has reasonable cause to believe[14] that any person may be a party to an arrangement which should be registered, may give notice requiring him to notify the Registrar whether he is a party, and what are the details of the arrangement. Alternatively he may empower an officer to enter premises at a reasonable time, from which such a person carries on business, and inspect or copy documents found there.[15] Criminal sanctions are then imposed to ensure compliance with the registration requirements of the bill.[16] But the offences as defined can be committed only knowingly, so no objection can be made on that ground.

Doubtless the mere publicity would, of itself, lead to modification of some restrictive agreements. But the bill is not without further 'teeth.' A Restrictive Practices Court is to be set up,[17] manned by three High Court judges to be nominated by the Lord Chancellor, one judge of the Court of Session, and one judge of the Supreme Court of Northern Ireland,[18] and up to nine[18a] other members, recommended by the Lord Chancellor, and holding office for not more than three years. The lay members of the court, to be chosen on the recommendation of the Lord Chancellor by virtue of their knowledge of or

[11] Clause 8.
[11a] On the advice of the Prime Minister.
[12] Clause 1.
[13] Clause 9 (3).
[14] See p. 151, *infra*.
[15] Clause 11.
[16] Clause 12.
[17] Clauses 2 and 3.
[18] Clause 3.
[18a] Increased to ten in the Committee stage; House of Commons Debates, 1956, Vol. 551, Col. 475.

experience in industry, commerce or public affairs, may resign or be dismissed for misbehaviour.[19] For any hearing the court shall consist of a judge and at least two other members.[20] *The Times*[1] assumes that these will necessarily be lay members, but this is not stated in the bill. Personally I sincerely hope that in practice they will be lay members, as the judicial training, requiring strict proof of matters alleged may not be entirely suitable for the regulation of economic affairs.

'Once . . . the courts admit . . . to judicial inquiry the question of the reasonableness of the activities of business organisations, they move . . . into a realm where economists, even today, tread lightly and with unsure foot . . . issues of reasonableness (or public interest)[2] in the economic sphere are extremely difficult to handle from the standpoint of judicial administration. Law is fundamentally concerned with norms for conduct. . . . The judicial process proceeds case by case, precedent by precedent, to build up rules or norms of general application. These are to be applied in subsequent similar cases in all the inexorability and majesty of established principles of law. But objective standards of *reasonableness* are at best, even in relatively simple factual situations, difficult to establish in advance. Circumstances vary from case to case and what is reasonable in the circumstances varies from case to case. When the issue is what restraints are reasonable in a situation involving business conduct or the structure of business organisation, the precise questions of fact will rarely be similar and usually they will be quite complex.'[3]

Under the bill, the judge(s) will determine all matters of law, but on questions of fact each member will have an equal vote, and in the case of equality, the President will have a second or casting vote—again giving additional weight to the judicial personnel. Appeal will then lie to the Court of Appeal on questions of law or to the Court of Session or Court of Appeal in Northern Ireland.[4]

[19] Clause 4.
[20] Clause 4 and Schedule.
[1] February 16, 1956.
[2] The judges themselves refuse to allow new heads of public policy. It is hard that this new head of 'unruly horses' should be thrust upon them.
[3] Carlston, *loc. cit.*, pp. 200–201, discussing the American case, *Standard Oil Co. of New Jersey* v. *U.S.* (1911) 221 U.S. 1.
[4] Clause 2 and Schedule.

The Registrar may apply to this court for a declaration that any agreement registered is contrary to the public interest.[5] Public interest is defined in clause 16 which enacts that a restriction is to be deemed contrary to the public interest, except in the cases therein set out. So it seems that no other matters may be considered by the court. These exemptions were criticised by the Liberals in the House, on the introduction of the bill,[6] as allowing too many loopholes. They are wider than the exceptions suggested by the Commission, and, amongst others, include also cases where the removal of the restriction would be likely to have a serious and persistent effect of the general level of employment in one or more areas in which a substantial proportion of the trade or industry is situated. This is the opposite of the West German bill,[7] which exempts cartels from its provisions where, because of 'a decline in sales, temporary and not based on a lasting change in demand,' a restrictive arrangement is 'necessary in order to avoid endangering the existence' of undertakings which after the end of the emergency will be regarded as 'essential to the national economy.' The circumstances cannot cover a situation of long-term redundancy. No doubt workers may not like having to leave a district, but in a period of full employment, can we afford to allow uneconomic industries to be supported by restrictive practices, when the capital and labour might be more usefully employed. It is difficult to assess the unhappiness caused by moving homes, in terms of productivity; but is this a case for exemption from registration? It would seem more reasonable to exempt restrictions when short term conditions might cause serious local unemployment, when the people would not know whether to move during the emergency and might be difficult to replace when it was over.

The sanction for any arrangement found contrary to the public benefit is an injunction against giving effect to it or a similar one, and this is enforceable by the rules of contempt of court—an excellent remedy. 'The law should be formulated so as to foster and not to inhibit dynamic enterprise, risk-taking and imaginative business decisions. Vigorous business policy should not be constantly subject to the inhibitory threat of criminal

[5] Clause 15.
[6] February 15, 1956.
[7] *The Times*, February 22, 1956.

prosecutions.'[8] But it might be argued that private citizens injured by an arrangement, not within one of the exempted classes, should be able to bring an action for damages or petition for an injunction in the Registrar's name. The Registrar will doubtless be short of staff and funds and so able to take to court only the large or serious cases; is this not hard on the small man in a small industry?

There are further provisions allowing producers and importers of branded goods to sue retailers, with whom they have no contractual relationship, for selling below their published prices, or offering discounts having the same effect.[9] However they are forbidden to make or carry out an arrangement mutually to enforce similar provisions by other wholesalers, by withholding supplies, or raising charges.[10] It is encouraging to see a further whittling away of the doctrine of privity of contract: only retailers who know of the retail prices will be liable, and as the minority report pointed out,[11] they deserve little sympathy if they infringe the conditions subject to which they bought. On the other hand, damages and perhaps an injunction are fairer sanctions than the possibility of being blacklisted and put out of business.

The main objections against the bill, in my opinion, are that it will take some time to extend the registrations far through industry and commerce, and even longer to bring sufficient cases before the court. I think that this may have been to some extent inevitable, as the types of practice seem so variable, and the circumstances so different that only a case by case method would be really fair. However a more administrative tribunal operating without the rigid, and often delaying rules of evidence and with a greater background-knowledge and experience of economics and commerce, might have been able to operate more quickly, especially in the first instance, when there is a huge backlog of cases.

As fundamental, in my opinion, is the failure of the bill to deal with practices not between two or more persons, leaving this vital matter to the greatly weakened Monopolies Commission.[12]

[8] Carlston, *loc. cit.*, at p. 199.
[9] Clause 20; but, as introduced, there is a loophole in this clause.
[10] Clause 19.
[11] Para. 265.
[12] Clauses 22 and 23.

The large company is free to operate, even through subsidiaries, without having its practices registered.[13] Further services,[14] such as transport are not covered. It may be that the Registrar and court will be busy enough for a time considering the supply of goods, but services seem to be excluded until further legislation is introduced.

Another large omission is restrictive practices by workers' trade unions. The Commission was not asked to consider them, nor are they mentioned in the bill. The *Sunday Times,* in its current series of articles on 'Saboteurs of Prosperity' deals with such problems as demarcation in shipbuilding,[15] as well as price rings in the building trade.[16] Many of these employees' practices and agreements are as suitable to the depression era of under-employment, as are some of the practices of employers. A strong case certainly seems to have been made for their consideration, though possibly in separate legislation, as Mr. Thorneycroft mentioned on the second reading of the bill.[17]

FOREIGN SYSTEMS OF REGISTRATION

Because of considerations of time and space, we can hardly consider any other system as a whole but we can look at some aspects of various systems of registration in force in Europe.[18] Such systems differ very greatly: in Sweden,[19] all cartel agreements must be registered, but publication of the register is found a sufficient safeguard without criminal sanctions; in Austria,[20] on the other hand, registration is allowed only of approved practices, and the employment of unregistered agreements is discouraged by stringent rules as to fines and imprisonment.

In most countries the obligation to register agreements and practices lies on the parties, though in Norway the register authority itself may provisionally register any agreement or

13 Clause 30 (1), clause 5, etc.
14 Clause 5 (1).
15 February 5, 1956.
16 February 12, 1956.
17 House of Commons Debates, March 6, 1956.
18 See Restrictive Business Practices, Analysis of Government Measures Relating to Restrictive Business Practices. Ecosoc. official records: 16th session, supp. 11, 11a and 11b. For an informative readable monograph on the U.S. anti-trust laws, see J. G. Van Cise, *Understanding the Anti-Trust Laws* (1955); also D. F. Turner, 'The American Antitrust Laws' (1955) 18 *Modern Law Review,* p. 244.
19 No. 448 of June 29, 1946.
20 Cartels Act, July 4, 1951.

decision which it considers restrictive. The parties may then have it removed by proving that either it is not restrictive or that it does not interfere with the public interest. In all countries, other than Italy, which have enacted registration statutes, the law applies to contractual agreements among independent enterprises. In Italy, filing is required only in the case of business agreements establishing a joint organisation for doing business with third parties. Apart from Italy and Austria, informal agreements and understandings, not taking the usual contractual form are also subject to registration. In Norway and Denmark, single firms having financial control over other firms are required to file even arrangements if they exercise a material influence on price, production or trade.[1]

Sweden is the only registration country where the obligation to file arises only upon a request by the register authority. Such a request is addressed to all members of an industry, and an industry survey is then undertaken by the Government. Registration is dependent on a subsequent decision by the Government, and takes place only after the survey is completed. But in all other countries both the original decisions and agreements, and any later changes must be filed within a stated time by the enterprises themselves.

In most countries, as in our new bill,[2] there is an exemption of agreements and decisions relating to foreign markets, except in so far as they affect the home market. Even the United States anti-trust laws make provision for exempting export trade associations, which file particulars with the Federal Trade Commission. Apart from this, some laws are very general. For instance, under the Norwegian law of 1926, enterprises or groups of enterprises are required to file reports on agreements, arrangements or rules which are designed to regulate prices, production or sales and have important effects on domestic market conditions. Under legislation proposed in 1951, filing and registration are required whenever the parties to an agreement, or a single firm, are responsible for at least one quarter of the Norwegian production or trade of a commodity or service.

[1] Act concerning Price Agreements, etc. No. 158 of 1937, May 18, art. 8 (Denmark): Act to regulate Restraint of Competition and prevent Unfair Prices; March 12, 1926 (amended June 30, 1932, and June 24, 1938), s. 6 (2) (Norway).

[2] Clauses 6 and 25.

The legal effect of registration also differs widely in different countries. In Sweden and the Netherlands, all agreements having the prescribed effect on the market must be registered, and the information is checked for its accuracy, and in Sweden published (subject to the Government's liberty to keep certain information secret for up to twenty years).

In some countries, agreements affecting prices are limited: in Norway, such agreements or decisions can be made only with permission from the Price Directorate, which is also the registering authority, while in Denmark, the Price Control Board is authorised at any time, and despite prior registration, to forbid or modify any agreement.

FOREIGN TYPES OF TRIBUNAL

A related question, raised by the bill, is what sort of a tribunal should be created to decide whether particular restrictive agreements or practices operate against the public interest. Should it consist of High Court judges, or of business men or both? It may be well, then, to consider one or two types of tribunal in greater detail.

Decisions as to entries on the Austrian register are made by a special commission of the Superior Court of Vienna, with appeals from the Cartel Commission to the High Cartel Commission.[3] The members of these courts are chosen by the government; the chairman and deputy chairmen are judges, while the assessors are nominated by the Federal Government from names proposed by the Federal Chamber of Industrial Economy, the Austrian Chambers of Labour, Assembly and Agriculture. A Cartel Commission consists of the chairman or a deputy and one assessor from each of the three chambers.

Proceedings before the commission are public, except where it sits *in camera,* but even then bodies representing interests must be invited to attend, and be heard at their request. Appeals from either side are heard by the High Cartel Commission, including a chairman and six assessors.

Within two weeks of the conclusion of a cartel agreement, the agent of the cartel must notify the cartel register. The notice must contain not merely the date, parties and scope of the agreement, but also information as to the economic advantages to be

[3] Cartels Act, July 4, 1951, s. 5.

derived from it, the total production of that branch of the economy, the proportion covered by the cartel, the names of leading enterprises in the same branch of the economy not entering into the cartel, and information concerning the relationship to existing cartels. The Cartel Commission then sends copies of the notice to the chambers entitled to supply assessors to the Court, and they may require the Commission to ask for additional or missing information. The Commission may then register the agreement, rendering it legally effective. But the entry will be denied unless the agreement is terminable, at the latest within three years, at not more than six months' notice; any party may withdraw before the normal expiry time, if having exercised due care, maintenance of the agreement would expose his business to unfair risks. Nor will an agreement be registered if it prevents goods or services, not the object of the agreement, from being offered to the consumer at all or below a certain price, or if the goods and services subject to the agreement are to be withheld from certain persons or groups of persons despite their willingness to meet the indicated conditions. There is then an overriding provision preventing registration if it is likely to raise prices or restrict production in a way not justified by the general economic conditions.

The register is open to public inspection and certified copies of entries may be obtained. It is said that the publicity thus given to restrictive practices is itself a powerful deterrent to their use.

But stringent penalties also are laid down to prevent undue cartelisation. The minimum punishment for using a cartel to raise prices or restrict production in a way not justified by general economic conditions is three month's rigorous detention, while imprisonment for three years, a fine of 200,000 schillings and dissolution of the cartel may be ordered.[4] The same penalties deter the carrying out of an unregistered cartel agreement[5] or modifying an existing one without filing the requisite amendments.

To sum up: no contract as to restrictive practices or cartelisation may be enforced or operated unless filed, and approved as being in the public interest. The tribunal determining this sits usually in public and consists of a judge with lay assessors.

In the United States,[6] anti-trust enforcement is divided

[4] Section 24. [5] Section 25. [6] See J. G. Van Cise, *loc. cit*

between two bodies. The Anti-trust Division of the Department of Justice is primarily a prosecutor, acting on its own initiative, or on the complaint of a private citizen, while the Federal Trade Commission was meant to practice preventive law through regulatory activities as well as by the initiation and conduct of contention proceedings. Nevertheless the Department of Justice, which suffers from shortage of staff, lack of funds, and increasing numbers of complaints, will often negotiate for the settlement of a case by the entering of a consent judgment. This saves the defendants from the glare of publicity, and also from the threat of civil cases for triple damages, for a judgment following trial is prima facie evidence of facts found in favour even of non-parties to the litigation. Further the Attorney-General will on request consider proposed mergers, and state whether it is the immediate intention of the Division to prosecute if the proposed merger is effected. This is no defence to subsequent proceedings but shows the present reaction of the Division.

The F.T.C. established a Bureau of Consultation in July, 1954. It has three purposes: to act in a co-operative and consultative capacity with business; to give informal advice on matters involving the laws administered by the Commission; and to seek voluntary compliance with such laws by means of conferences, informal hearings and other types of informal procedures. It advises small firms as to how to initiate a complaint, as well as larger projects. It sometimes holds Conferences at which all members of a particular industry are invited to attend, and submit drafts of suggested rules directed towards eliminating and preventing unfair practices in the industry. Advice as to the effect of proposed mergers is often sought from this Bureau, instead of from the Attorney-General, and may be initiated by the Bureau. However, although much work is done by such informal advisory procedures, the F.T.C. is not without sanctions.

The staff is small, 600 in all, including cleaners and secretarial staff and largely expert. It cannot therefore deal with a vast number of cases, and only those most injurious to the public interest are taken. To prosecute for minor offences would waste public funds, though the Commission may help private litigants informally. To aid it in the multiple issues in any case, it has set up a Bureau of Economics to help in the initial, as well as the trial, stages of a case. It may consider a whole branch of industry,

and then issue complaints against some firms in the field. When the price of coffee soared recently the Commission initiated a thorough economic investigation, revealing that the price spiral was due to many forces: inadequate crop reporting, speculation, raising of the minimum export price by the Brazilian Government, and a restrictive contract on the New York Coffee and Sugar Exchange. As a result the Commission recommended legislation to Congress. After the publication of the report, the price dropped substantially, and later the Commission issued a complaint against the New York Coffee and Sugar Clearing Association in October, 1954, which resulted in a cease and desist order being issued in February, 1955.

Actual cases are heard by one of the F.T.C.'s Examiners, with rights of appeal to the Commissioners, and thence to the Federal Courts. But in fact almost two-thirds of the cases never get as far as a cease and desist order, as there is a procedure by which the defendant can enter into a written stipulation not to continue or repeat the practices complained of, thus saving much unwanted publicity and costs. Of the remaining third, many firms prefer to consent to a cease and desist order, which is as fully effective as one resulting from litigation, but again saves costs and untoward publicity. One might have expected that all this work would be very costly and slow with such a small staff, but in the last few years there has been little delay in deciding cases, and half seem to be settled within five months of the first complaint.[7] One may notice that only on the second appeal does the case go before a judge as opposed to a trade expert. The emphasis is on the consent procedure, which is of course more formal than the investigations and advice we first considered. There is also a special committee to review the cases and see that cease and desist orders are being complied with.

The general view of the American enforcement bodies, then, is that a great deal of informal discussions and negotiations go on, coupled with economic field surveys. But this is backed by heavy penalties for strong cases of infringement. Companies may be dissolved, ordered to cease and desist from certain practices, and condemned in damages. They may have to pay treble

[7] This makes it hard to understand Mr. Thorneycroft's reference during the second reading of the bill to the interminable delays and endless debate . . . inevitably associated with the administrative solution (*The Times*, March 7, 1956).

damages to private citizens injured, and may also be liable to large fines. There is no doubt that fear of such proceedings has deterred many firms from absorbing more competitors, and few of the predatory practices common in the early part of the century are now found. The lack of information to be found in the register in other countries requires the field work of economists. Though there are many detailed criticisms to be found in American law journals every year, I think few experts on the American field would change their laws basically.

CONCLUSION

By comparison with these systems, our bill would rely far less on the work of economic and industrial experts, and far more on judges, even at first instance. Without intending to belittle the excellent work done by them in other fields, I feel that the consideration of the public interest in the field of restrictive practices would be better left in other hands, save, perhaps, on ultimate appeal.[8] Proceedings might then be faster and experts more familiar with industrial and commercial ways of thought.

However, the failure of the bill to deal with restrictive practices outside the field of the manufacture and supply of goods, or with restrictive practices used by single firms, or with other abuses of monopoly power,[9] render it, in my opinion, but a weak instrument for the improvement of competitive conditions in trade or industry. There seems to be little to realise the Government's hope that retail prices will thereby be substantially lowered.

[8] p. 150, *supra*.
[9] Save under the old Monopolies Commission as weakened by the bill; clauses 22 and 23.

10

THE CONSTITUTIONAL FUTURE OF MALTA

Richard C. FitzGerald

During June and July, 1955, a series of private talks took place in London between the United Kingdom Secretary of State for the Colonies and the Prime Minister of Malta (Mr. Mintoff), and the Leader of the Opposition in Malta (Dr. Borg Olivier), and in the course of the talks the British Prime Minister announced (on July 6, 1955) that the United Kingdom Government proposed to convene a Round Table Conference (hereinafter referred to as 'the Conference'), comprising representatives of all the political parties at Westminster.* The composition and terms of reference of this Conference were announced by the British Prime Minister on July 28, 1955, the terms of reference being:

> 'To consider constitutional and related questions arising from proposals for closer association between Malta and the United Kingdom and, in particular, from the proposal that Malta should in future be represented in the Parliament at Westminster.
>
> 'To consult representatives of the political parties in the Legislative Assembly of Malta, and such other persons as may seem fit to them.
>
> 'To report their conclusions and recommendations.'

The Report[1] of the Conference was published on December 16, 1955, and this paper deals with some aspects of the conclusions and recommendations of the Conference. But it may be useful to give, in the first place, a brief outline of the present situation in Malta.

The Maltese Islands (of which Malta and Gozo are the only

* As Professor FitzGerald was a member of the Malta Nationalist Party Delegation at both the private talks and the Round Table Conference, he wishes to state that the views expressed in this paper are his personal views.

[1] Report, Malta Round Table Conference, 1955, Cmd. 9657/1955, hereinafter referred to as 'Report.'

sizeable ones) have an area of about 122 square miles, or 52,000 acres, *i.e.*, about the size of the County of London. Of this total acreage, 45,000 acres are under cultivation, and 2,100 acres are under irrigation, whilst 5,000 acres consist of rocky land. The people of Malta, who have their own language, culture and customs, and their ancient Roman Catholic traditions, have a strong national pride and a history of parliamentary government. They have never lost their own separate identity. The Islands have held a position of importance in the Mediterranean for many centuries, though always in association with other Powers.[2] It has a total civil population of almost 316,000.[3]

The people of Malta freely chose in 1802 to place themselves and their Islands under the protection and sovereignty of the British Crown, their choice being recorded in the Declaration of Rights of June 15, 1802. The Islands were formally annexed in 1814 under the Treaty of Paris.[4]

Under the present Constitution, granted in 1947,[5] there is in Malta:

(1) A Legislative Assembly consisting of forty members, elected on a system of proportional representation, with power to make laws for the peace, order and good government of Malta, but with no power over certain matters specified in the Constitution—the "reserved matters"—which are reserved to

(2) The Maltese Imperial Government, consisting of the Governor, the Lieutenant-Governor, the Legal Secretary, the Director of Civil Aviation, and the Secretary to the Maltese Imperial Government.

(3) The Privy Council, consisting of the Executive Council, composed of Maltese Ministers, and the Nominated Council, composed of the Lieutenant-Governor and Legal Secretary (*ex officio* members) and the three Service Chiefs in Malta.

The Governor, although generally speaking he follows the advice of the Executive Council, *i.e.*, the Maltese Ministers, in regard to all non-reserved matters, has the power to disregard their advice if he sees sufficient reason to do so, and as regards

[2] Report, para. 7; p. 22, verbatim transcript of the Fourth Session of the Malta Round Table Conference, hereinafter referred to as 'the Conference.'

[3] Report, para. 8.

[4] *ibid.*, para. 13.

[5] By the Malta (Constitution) Letters Patent and the Malta (Office of Governor) Letters Patent, 1947, as amended.

the reserved matters, though he must consult the Nominated Council, he is not bound to follow the advice of that Council.

The Legislative Assembly has power to amend or repeal the Constitution, but legislation for this purpose cannot be passed unless the votes of not less than two-thirds of all the members of the Legislative Assembly are cast in favour of it. This power of amendment or repeal does not extend to the reserved matters or to other matters specified in the Constitution, *i.e.*, the Judicature, language, religious toleration, and emergency laws.[6]

At the last General Election in Malta (February, 1955) out of a total electorate of approximately 150,000, 120,655 people voted, the final figures, under the proportional representation system, being 68,447 for the Malta Labour Party (the present Government) and 52,163 for the Nationalist Party. For a Government to be able to work in Malta it must obtain at least twenty-two of the forty seats in the Legislative Assembly, because with twenty-one or less the Government would have no majority in committee. The Nationalist Party has seventeen seats and the Labour Party twenty-three seats, so that Mr. Mintoff's Government has just one seat more than the minimum number necessary to enable a Government to work.[7] These figures indicate how evenly Malta is divided politically at the present time, a situation which should be constantly kept in mind when considering constitutional changes for Malta.

Turning now to the conclusions and recommendations of the Conference for economic development and constitutional changes, it should be mentioned that the Conference were not unanimous, two members dissenting from the majority views.

ECONOMIC DEVELOPMENT

As the Report states,[8] since the Napoleonic wars Malta has been in continuous use as a British naval base and fortress, and it has been of immense value to the United Kingdom and the other countries of the Commonwealth. The Report goes on to record[9] that recent years have seen the decision to withdraw British forces from the Suez Canal Zone, the growth of tension and unrest in

[6] See the above-mentioned Letters Patent.
[7] pp. 22 and 25, verbatim transcript of the Tenth Session of the Conference.
[8] Report, para. 14.
[9] *ibid.*, para. 15.

the Middle East and North Africa, and the establishment in Malta of the Headquarters of the NATO Commander-in-Chief, Allied Forces, Mediterranean. All these factors have combined to emphasise the continued importance of Malta as a pivotal point in the Mediterranean. Further, the strategic importance of Malta, and the events of the last 150 years, have resulted in its economic dependence upon the United Kingdom.[10] What of the future? The United Kingdom Service Departments consider that there is no near prospect of a decline in Malta's strategic importance or in the relative level of defence expenditure in Malta.[11]

This functional use of Malta by the United Kingdom has had serious adverse effects on the normal economy of Malta. At the present moment there are three sea-going fishing vessels in Malta, and, until very recently, there has been no navigation school. Although Malta is very near one of the richest fishing grounds in the Mediterranean,[12] Malta imports about £200,000 worth of fish every year. One strongly supports the view of the Conference that there should be a vigorous effort to reduce Malta's dependence on imported fish supplies.[13] It is difficult to understand why the United Kingdom has not provided the necessary capital to enable this to be achieved long before now. Likewise, the present position of the user of the harbour for civilian purposes is most unsatisfactory. If capital investment to the harbour were applied in the necessary way it is estimated that import costs would be cut by anything between 50 and 75 per cent, and it would also be possible to handle ships 'exportwise,' as Malta is on one of the most important and busy shipping routes.[14] It is reassuring to learn that a scheme of harbour improvement is being worked out and that it will be given a high priority in the new development plan.[15]

As the Conference points out, if Malta is to attract more visitors the beaches will have to be improved and other tourist facilities provided.[16] The Maltese Prime Minister stated that there is a law in Malta which makes the foreshore available to

[10] *ibid.*, para. 16.
[11] *ibid.*, para. 48.
[12] p. 21, verbatim transcript of the Fourth Session of the Conference.
[13] Report, para. 52.
[14] p. 23, verbatim transcript of the Fourth Session of the Conference.
[15] Report, para. 53.
[16] *ibid.*, para. 54.

everybody, but that the Maltese have considerable difficulty in getting the Services to comply with it.[17] Steps should be taken to remove this kind of hindrance to the development of the tourist trade as a contribution to Malta's revenue.

The view of the Conference is that it is unlikely there will be a rapid expansion of industries in the immediate future,[18] and it suggests that certain materials and manufactured goods at present imported by the Service Departments from the United Kingdom might be produced in the Islands, thereby helping to stimulate local industry.[19] In the light of Malta's economic position one would have thought that such a step would have been taken by the United Kingdom authorities before this.

The Maltese Prime Minister stated that if new avenues of employment are found for 20,000 workers the problem of Malta will be solved for the next generation, and that unless the population increases tremendously it will be solved permanently.[20] Moreover, the discovery of oil in Malta would completely change the situation. A company it at present engaged in boring activities in Malta for oil. It should perhaps be mentioned that a very hopeful oil field has been found in Sicily about sixty miles north of Malta.[1]

Up to the present time what one might call the ordinary economy of Malta has had to give way, over and over again, to the defence economy. In other words, Maltese interests have been subordinated to those of the United Kingdom, the Commonwealth, and their allies. Whether it should have been done to the extent to which it has been done is arguable. But there is no room for argument as to the duty of the United Kingdom to give such financial aid as may prove necessary to enable the Maltese Government to carry out a development plan of the size and scope required to meet the present situation. This duty is admitted by the United Kingdom Government. After the June-July, 1955, talks, an agreed statement was issued stating *inter alia* that the social and economic development of Malta is a necessity and calls for a joint and sustained effort by both the United Kingdom and Malta; that to assure the steady advance

[17] p. 20, verbatim transcript of the Sixth Session of the Conference.
[18] Report, para. 55.
[19] *ibid.*
[20] p. 1, verbatim transcript of the Fifth Session of the Conference.
[1] p. 13, *ibid.*

of the Islands a long-term development plan is being prepared; and that, having in view that improved living standards can be maintained only by increasing productivity and expanding the national income of Malta, Her Majesty's Government undertakes to contribute to the cost of the necessary capital works, to help secure the technical means and, in the interim period before these measures lead to the required expansion in Malta's own revenues, to assist as may prove necessary to balancing the budget on recurrent account.[2]

As the Conference says, in the task of economic development and progress they are confident that the Maltese people can count upon continued and wholehearted co-operation and assistance from the Government and people of the United Kingdom.[3] What it is important to note is that this financial assistance is not conditional upon any constitutional changes.

CONSTITUTIONAL CHANGES

Consideration must now be given to the constitutional changes recommended by the Conference.

(1) *Division of Legislative Functions.* The Conference recommends that, subject to the principle of religious toleration as embodied in the Declaration of Rights of 1802 and in recent Maltese Constitutions, the legislative authority of the Maltese Parliament should extend to all matters other than defence and foreign affairs, and, ultimately, direct taxation.[4] This recommendation, if adopted, will entail a careful revision of the existing list of reserved matters[5] as these matters go far beyond what is normally understood by defence and foreign affairs. But it is easier to talk of revision than to carry it out. For example, do the importation of goods (including animals) for the use of naval, military and air forces, and the imposition of custom and other duties thereon; postal and telegraphic censorship, and immigration, fall within defence or foreign affairs? As the Conference points out, the scope of defence and foreign affairs is much wider today than it was when the 1921 Maltese Constitution was drawn up,[6] but it may not be easy for the parties to reach agree-

[2] Report, Appendix G.
[3] *ibid.*, para. 61.
[4] *ibid.*, para. 85.
[5] Malta (Constitution) Letters Patent, 1947, s. 23 (3).
[6] Report, para. 88.

ment. Aviation is a good example of the difficulties. The administration of civil aviation will not be covered by defence and foreign affairs. Operational control, however, must, in the opinion of the Conference, be retained by the United Kingdom Service authorities.[7] That too, is the view of the Maltese Prime Minister, who stated that today it is impossible to have any control except a single control over air navigation because the airfields are so close together. There is one purely military airfield and another for joint user; they are almost touching and it is evident there must be a single control.[8]

(2) *Abolition of the Maltese Imperial Government.* The Conference recommends that there should not be two separate Governments in Malta, and in effect, therefore, it recommends the abolition of the Maltese Imperial Government.[9] This is a welcome recommendation. Obviously, however, there must be some authority in Malta to carry out decisions of the United Kingdom authorities in the fields of defence and foreign affairs, and the Conference recommends that responsibility for Malta's affairs in London should be transferred to the

(3) *Secretary of State for the Home Department,* who should be represented in Malta by a United Kingdom representative at the head of a staff constituting the United Kingdom agency in Malta, with the necessary powers, under the authority of the Home Secretary, to carry out the decisions of the United Kingdom Government in defence and foreign affairs and to consult and collaborate with the Maltese Government in matters of joint concern.[10] The Conference did not work out how this authority should be set up and staffed, as this will require careful study in consultation with the Maltese Government.[11] The recommendation that the Home Secretary should be the responsible Minister is peculiar. What does the United Kingdom Home Secretary know about the affairs of Malta?

The Conference have expressed the view that the problem as regards legislation is comparatively small, as they understand that the main legislation on foreign affairs affecting Malta relates to diplomatic privileges (a matter which, incidentally, has caused

[7] Report, para. 88.
[8] p. 21, verbatim transcript of the Second Session of the Conference.
[9] Report, para. 86.
[10] *ibid.*, para. 87.
[11] *ibid.*, para. 86.

considerable friction in Malta), and that, in the field of defence, there are a good many provisions in United Kingdom law which would neither be appropriate nor needed in Malta. The main difficulty would arise with regard to borderline cases or changing requirements, and it is thus important to ensure that legislation is not held up by disputes over *vires*. After considering different suggestions, the Conference have stated a preference for the suggestion that provision should be made for the power of the Parliament at Westminster to legislate on defence and foreign affairs to be devolved at discretion on the Maltese Parliament. This suggestion, they say, appears to offer a means of dealing with matters (such as the control of transit of strategic materials) the subject of which may normally be one falling to be dealt with by the Maltese Parliament but the object of which may be for the purpose of defence and foreign affairs.[12]

Suppose that the Maltese Parliament wishes to pass a Bill touching on defence and foreign affairs. In other words, it attempts to encroach upon these reserved matters. The Conference suggests that such a difficulty could be overcome by the new Constitution providing that any Bill which, in the opinion of the Governor or, alternatively, on the basis of representations to him by the United Kingdom representative in Malta, appeared to impinge on the field of defence and foreign affairs, should be referred to the Home Secretary, whose decision, after consultation with the Maltese Ministers, would be final.[13]

These recommendations deal with legislative power and its exercise. But it is of the utmost importance that, once legislation is enacted, the exercise of executive authority by the United Kingdom agency in Malta should not be subjected to unreasonable delays owing to differences, however genuine, about the propriety of the action involved. Consequently, there must be a regular means of consultation and co-ordination between the Maltese Government and the United Kingdom agency in Malta,[14] and further, the Maltese Prime Minister should be kept informed of general developments in the field of defence and foreign affairs in the Mediterranean area to the extent necessary to provide the Maltese Government with the background required for a proper understanding of the requirements of defence in Malta.[15] The

[12] *ibid.*, para. 89.
[13] *ibid.*, para. 90.
[14] *ibid.*, para. 91.
[15] *ibid.*, para. 97.

extent to which the United Kingdom authorities have failed to do this in the past is clearly shown by the manner in which the Maltese Prime Minister was informed of the United Kingdom's decision to establish NATO Headquarters at Malta. It was about 9 o'clock in the evening of Christmas Eve when the Commander-in-Chief went to the Prime Minister's house, found nobody there, and wrote a short note stating that he would be making a broadcast to the people of Malta the next morning. He said it would mainly be a Christmas message of greetings, but incidentally he was going also to tell them that Malta was going to have NATO Headquarters. He said he would be at the Phœnicia Hotel until 11 o'clock and at Admiralty House after that. When the Maltese Prime Minister got home he got in touch with the Commander-in-Chief and asked him kindly to limit his broadcast to the message of Christmas greetings, at least until he, the Prime Minister, had had full information about the matter. No wonder there have been difficulties over the working of the present Constitution!

To ensure a regular means of consultation and co-ordination between the proposed United Kingdom agency in Malta and the Maltese Government the Conference recommends:

(4) The setting up of three Committees, *viz.*—

(a) A Defence Council (in place of the Nominated Council) under the chairmanship of the Governor, of which the Maltese Prime Minister, the United Kingdom representative in Malta, and the Heads of the Services in Malta, would be members. The functions of this Defence Council would be (i) to inform the Maltese Prime Minister of developments in defence and foreign affairs, and (ii) to discuss matters of defence policy in Malta on which there might be a conflict of interests with the Maltese Government.

(b) A Committee, presided over by a Maltese Minister, on which representatives of the Services and the United Kingdom agency in Malta would sit. The function of this Committee would be to deal with matters concerning the economic and financial problems involved in the respective activities in Malta of the Service Departments and the Maltese Government.[16]

The setting up of these two Committees would mean the abolition of that unsuccessful body, the Privy Council.

[16] Report, para. 97.

(c) A Joint Ministerial Committee in London, consisting of United Kingdom and Maltese Ministers and presided over by a United Kingdom Minister, the functions of this Committee being to deal with some important issues and some problems of particular difficulty; to exchange information; and to be used for consultation between the two sides. This Committee, say the Conference, could not function successfully if it were to be regarded, and used, merely as a court of appeal for disputes unresolved by the process of consultation in Malta, or for striking bargains on other disputed questions.[17]

These three Committees would be advisory and consultative in character, and would not have independent executive powers. They could not alter decisions of Parliament, nor purport to effect *ad hoc* changes in the Maltese Constitution to suit the requirements of particular cases, nor should they be allowed to obscure the responsibilities of Ministers to their Parliaments nor infringe the doctrine of collective Ministerial responsibility. Hence, say the Conference, these three Committees should be set up administratively, rather than by constitutional instrument.[18]

(5) The Conference then recommend that the new Constitution should provide that the Governor should in matters other than defence and foreign affairs act upon the advice of the Maltese Ministers, *i.e.*, he should no longer have discretion to ignore the advice of Maltese Ministers in matters which are their concern.[19] This recommendation, however, does not include emergency powers.

DOMINION STATUS

In 1946 the National Assembly was unanimous in requesting that the responsibility for the affairs of Malta should be transferred to the Dominions Office, but the Constitutional Commissioner merely stated in reply that the proposal could not be accepted. In 1953 the then Maltese Prime Minister, Dr. Borg Olivier, requested the transfer of responsibility to the Commonwealth Relations Office, but the request was refused by the United Kingdom Secretary of State for the Colonies, who made a counter-proposal offering a transfer to the Home Office. In his

[17] *ibid.*, para. 98.
[18] *ibid.*, para. 99.
[19] *ibid.*, para. 92.

opening statement to the Conference, Mr. Mintoff, the Maltese Prime Minister said it was the British Government that put out the first feeler, this 'first feeler' being the counter-proposal just mentioned.[20] This counter proposal was eventually accepted by the Malta Labour Party, and it was taken as a possible gesture to meet that Party half-way in their integration thesis.[1] Before the last General Election in Malta, *i.e.*, that held in February, 1955, the Governor of Malta broadcast and laid down certain proposals and made certain suggestions which the Maltese electorate should follow when registering their votes. One of the things then said by the Governor was that Dominion status was ruled out in the foreseeable future.[2] As the direct result of the United Kingdom's determination to bar Malta's advancement towards Dominion status Mr. Mintoff thought that there was no other way for giving equality of status to the Maltese people except representation at Westminster.[3] Thus his proposal for integration is a second best solution forced upon him by the United Kingdom's attitude, which view is supported by the answer he gave in reply to a question put to him by a member of the Conference. The questioner said he understood it to be the Maltese Prime Minister's party's decision that it was the fact that the road to self-government, the traditional road to self-government inside the Commonwealth, was blocked by the uses of Malta as a fortress, that Malta can, therefore, only achieve the status she is entitled to by direct representation at Westminster. He went on, 'Do I understand that that would be the Prime Minister's view, even if Malta was economically viable?' The Prime Minister's reply was, 'It is such a hypothetical question that it is impossible for me to answer it. Our trend of thought would be so different and the local atmosphere would be so completely removed from what it is today that I cannot possibly conjecture what even my own ideas would be.'[4] But is it such a hypothetical question? Mention has already been made of the view expressed by the financial expert to the Maltese Government that the discovery of oil in Malta would completely change the situation. Assume oil is discovered, and that the

[20] p. 6, verbatim transcript of the Second Session of the Conference.
[1] p. 3, verbatim transcript of the Eighth Session of the Conference.
[2] *ibid.*, p. 9,
[3] p. 4, verbatim transcript of the Fourth Session of the Conference.
[4] p. 6, verbatim transcript of the Third Session of the Conference.

union of Malta with the United Kingdom is an accomplished fact. Would Malta be a contented part of the United Kingdom? The answer is obvious. People in the United Kingdom must realise the intense desire of the Maltese people for self-government, a desire which will not be permanently satisfied by integrating Malta with the United Kingdom. In his statement to the Conference when it was sitting in Malta the General Secretary of the General Workers' Union said that Dominion status would be a very nice thing to have if Malta could really have it with dignity,[5] and, in reply to a question from a member of the Conference as to whether, if the Maltese Government's constitutional demands were agreed to, that would be an end of questions of political demands or requests for any further constitutional advances, he said that it should help materially to make it possible.[6] Clearly the desire for self-government will not be satisfied for ever by integration. When Dr. Borg Olivier, as Prime Minister, made his request in 1953 for the transfer to the Commonwealth Relations Office he had the backing of all the Legislative Assembly in Malta, including the present Labour Party, and all the country. The only criticism he had in the Legislative Assembly was that probably he would satisfy himself with the mere transfer to that Office without insisting upon having the other advantages implied in that transfer. He was severely criticised by the present Prime Minister, who at that time was the Leader of the Opposition, for not at the same time insisting on attending the Commonwealth Conference which was held at the time of the Coronation.[7] Mention is made of these matters to give some idea of the depth of Malta's desire for self-government.

In November, 1951, the United Kingdom Secretary of State for the Colonies stated in the House of Commons, 'We all aim at helping colonial territories to attain self-government within the British Commonwealth. We are all determined to pursue economic and social development of colonial territories, so that they may keep pace with their political development.' A member of the Conference, a former Secretary of State for the Colonies, when questioning the Maltese Prime Minister, stated that the British

[5] *Times of Malta,* October 24, 1955.
[6] *ibid.,* October 25, 1955.
[7] p. 2, verbatim transcript of the Ninth Session of the Conference.

Government and the British people are committed to the policy by which people in the overseas territories for which the United Kingdom is responsible will attain equal status with the people of the United Kingdom by reaching the stage of what in the United Kingdom is called Dominion status. Has that not always been considered to be the national colonial policy of the United Kingdom, one to be followed by the United Kingdom Government no matter which political party formed the Government. And now what do we find? That in 1953, *i.e.*, within two years of making it, the United Kingdom Government was denying the application of the 1951 statement to Malta, and in 1955 the Conference reaching the conclusion that the road to full self-government is blocked in that the United Kingdom Parliament must exercise overriding powers in Malta in the fields of defence and foreign affairs, and, further, that having regard to the special circumstances of Malta, the proposals put before the Conference by the Nationalist Party for a 'quasi-Dominion' status would not be workable.[8]

It would appear that both the United Kingdom Government and the Conference have considered the matter in the light of the relationship at the present time between say, Canada, and the United Kingdom. But let us throw our minds back to the Imperial Conference, 1926. The Report of the Inter-Imperial Relations Committee of that Imperial Conference gave the following general description of Dominion status: 'They [the United Kingdom and the Dominions] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.' The Report went on: 'But the principles of equality and similarity, appropriate to status, do not universally extend to function.' Notwithstanding the bold statements made in this description of Dominion status the Dominions were, in 1926, still largely in the position of dependencies. It is true the United Kingdom Government had surrendered to full Dominion control great areas of activity, and did not wish to interfere with the exercise of discretion by the Dominions in those fields, but in any matter then vital to the Commonwealth

[8] Report, paras. 70 and 71.

the United Kingdom Government had not relaxed control. There was, in 1926, no real equality of the Dominions in matters of foreign policy. The issues of war and peace rested decisively with the United Kingdom Government. No Dominion could, at that time, declare war, make peace, or make a commercial treaty without the sanction of the United Kingdom Government and subject to ratification with the same sanction. The Locarno Pact was concluded by the United Kingdom long before a single Dominion had made up its mind on its merits, clear proof that in all essential foreign affairs the Dominions were dependencies. Further, in 1926, no Dominion relied on herself for defence. Canada made no effort whatever, Australia and New Zealand merely sought to co-operate with the United Kingdom Government in case of danger; and South Africa expected the United Kingdom to maintain the sea routes. The Prime Ministers of Canada and Australia in the 1926 period were attempting to secure more effective consultation with the United Kingdom on foreign matters so that their respective countries could feel that the United Kingdom was paying due regard to their wishes in international matters. Further marks of dependency in 1926 were the inability of the Dominions to legislate with extra-territorial effect except under express United Kingdom legislation, and the appeal from Dominion courts to the Judicial Committee of the Privy Council. In 1926 the doctrine of autonomy was an ideal, not a statement of fact. In 1955 the functions of the Dominions have radically changed from what they were in 1926. It would be more appropriate, when thinking of Dominion status in connection with Malta, to think in terms of the 1926 relationship than the 1955 one.

It must be emphasised that the request of the Nationalist Party is not for full Dominion status but only for full self-government *vis-à-vis* the United Kingdom.[9] It is for full self-government coupled with treaty rights for the United Kingdom in defence and foreign affairs, the treaties to be of indefinite duration with no ultimate aim beyond this where the treaties might be revised.[10] This is the ultimate aim, with no time limit for its achievement.[11] There is no need for Malta to have diplomatic representation in

[9] p. 4, verbatim transcript of the Eighth Session of the Conference.
[10] p. 17, verbatim transcript of the Ninth Session of the Conference.
[11] p. 9, verbatim transcript of the Tenth Session of the Conference.

foreign States,[12] and she does not want it, neither would she apply for membership of the United Nations.[13] Malta wishes to attend Conferences of Commonwealth Prime Ministers[14] so as to be able to take a full part in discussions on matters directly affecting Malta. This request for self-government recognises the need for some constitutional restriction in the fields of defence and foreign affairs. In other words, while the Nationalist Party wants equality of status *vis-à-vis* the United Kingdom so far as Malta's affairs are concerned, it concedes that the principles of equality and similarity appropriate to status do not universally extend to function. This attitude is in keeping with the concept of Dominion status.

The size of Malta cannot be accepted as a valid reason for withholding from her for ever the grant of self-government on the lines indicated above, neither can the present disabilities imposed by her lack of natural resources. Who knows the extent to which science may come to the aid of Malta in the future? To hold, for the reasons given by the United Kingdom authorities, that the road to self-government for Malta is blocked shows a lack of vision and hope inappropriate to the nuclear age in which we live.

INTEGRATION

The Maltese Prime Minister read to the Conference the six points which his Party set out in its political manifesto as a basis for a new constitution. Point No. 5 reads, 'Adequate representation of the Maltese people at Westminster,'[15] and went on to state that his proposals are a request for an Act of Union,[16] and that unless the Maltese people feel that they have representatives in Westminster who can draw the attention of the United Kingdom Government to grievances, small or large, that they are on a footing of parity with the British people, that they are being treated as equal, the whole plan of rehabilitation and co-operation with the British Government will really fail.[17] He added as a final point that on this question of representation at

[12] p. 13, verbatim transcript of the Eighth Session of the Conference.
[13] p. 7, verbatim transcript of the Ninth Session of the Conference.
[14] *ibid.*, p. 9.
[15] p. 3, verbatim transcript of the Second Session of the Conference.
[16] *ibid.*, p. 4.
[17] *ibid.*, p. 13.

Westminster there can be no compromise whatsoever.[18] His proposal is that the constitutional Act of the United Kingdom Parliament should give Malta the right to send not less than three members to the House of Commons with full powers.[19]

The proposal of the Maltese Government is not novel. Round about 1871 various schemes were on foot for furthering closer relations between the United Kingdom and the Colonies, and one was the admission of colonial representatives to the United Kingdom Parliament either with votes or, to avoid the difficulty of party affiliation, without them. In July, 1884, Lord Rosebery suggested their presence in the House of Lords.[20] Over eighty years ago, when political parties were not so highly organised as they are now, it was thought that party affiliation would be a difficulty. Would it not now be a much greater difficulty? And if the proposal is as sound as its advocates at the present time are making out, why has the United Kingdom Government, which has tried out every constitutional device imaginable in the British Commonwealth, overlooked this one? Surely it is because it is realised that the scheme could create more difficulties than it would overcome.

Mr. Mintoff agreed that the duties of the Maltese representatives at Westminster would be to get on the heels of any Government department to the administration of which the people in Malta objected.[1] Further, should there be some disagreement in the Malta Committee not settled by the Committee in London, then there would be another chance for Malta through her own representatives in the House of Commons.[2] But, as a member of the Conference pointed out to him, he might discover that the power of these three Members of Parliament is much less than he had hoped.[3] I do not think many Englishmen would have any doubt as to the ineffectiveness of three Members of Parliament in a total membership of 643. If this is correct when the dispute or grievance concerns something to be found in Great Britain itself, how much more so when it concerns a territory some 1,500 miles or so from Great Britain? The Nationalist

18 *ibid.*, p. 15.
19 *ibid.*, p. 18.
20 Keith, *Responsible Government in the Dominions*, 2nd ed. (1928), Vol. 2, p. 1158.
1 p. 25, verbatim transcript of the Second Session of the Conference.
2 p. 13, verbatim transcript of the Third Session of the Conference.
3 p. 6, verbatim transcript of the Fourth Session of the Conference.

Party is of the opinion that very little benefit could be derived from having Maltese Members of Parliament at Westminster.[4]

The views of the majority of the Conference as regards the question of Maltese representation in the House of Commons are as follows:

(1) To limit the right of Members of Parliament at Westminster representing Malta to asking questions and taking part in debates on foreign affairs and defence, and not to vote, would be repugnant to the dignity and traditions of the United Kingdom Parliament, and would not give the members from Malta equality of status and responsibility with members from the United Kingdom.[5]

(2) Such an arrangement or limitation would be unworkable, since it is not possible completely to distinguish matters of defence from more domestic aspects of United Kingdom affairs.[6]

(3) Such an arrangement or limitation might encourage the idea that the ties of the Maltese and United Kingdom peoples depend only on the material and physical effects of their common interest in defence.[7]

(4) Maltese representatives at Westminster would be interested in very many aspects of life in Britain, including the effects of budgetary policy.[8]

(5) The desire of the Maltese Government for a voice in the United Kingdom Parliament could not be met by enabling one or more representatives chosen by the Maltese Parliament to sit in the House of Lords.[9]

(6) Representation at Westminster is practicable and reasonable.[10]

(7) There should be three Maltese representatives at Westminster, elected in exactly the same way, and under the same laws governing representation of the people and electoral practices, as are members from the United Kingdom.[11]

These views are interesting, but further information is essential before one can give full and proper consideration to the matter. Many points arise, including the following:

(1) Suppose the Members of Parliament from Malta have no

[4] p. 9, verbatim transcript of the Seventh Session of the Conference.
[5] Report, para. 73.
[6] *ibid.*
[7] *ibid.*
[8] *ibid.*
[9] Report, para. 74.
[10] *ibid.*, para. 82.
[11] *ibid.*, para. 81.

political affiliation in Malta, or belong to a political party in opposition to the party forming the Maltese Government. Would this state of affairs not lead to difficulty from the point of view of the political life of Malta?

(2) Suppose they refuse to take their seats in the House of Commons. Of what use would representation at Westminster be to Malta?

(3) Something approaching 50 per cent of the Maltese people do not know English at all. In the Maltese Legislative Assembly itself there are members elected from Gozo, which is purely an agricultural island, who do not know or understand English.[12] Under the rules governing the manner of speaking in the House of Commons at Westminster a Member must address the House in English.[13] Will a Member elected for Malta be permitted to speak in Maltese in the House, and, if so, what arrangements will be made for enabling the other Members and the people of the United Kingdom to know what it was he said? If the existing rule is not altered, how could one say that genuine parliamentary representation at Westminster had been given to Malta?

(4) The majority view of the Conference gives no indication when Maltese representation at Westminster should be given. The majority recommendation or conclusion merely says that representation at Westminster is practicable and reasonable. When one turns to the minority report one reads that the dissenting members 'are not convinced that representation in the *next* Parliament of the United Kingdom is in accordance with the realities of the present situation.'[14] In view of the importance of the matter it is to be regretted that the Conference did not state when they think Maltese representation at Westminster is practicable and reasonable. We have seen that the Conference recommends that, ultimately, the legislative power of the Maltese Parliament shall not extend to direct taxation. That is, direct taxation will ultimately rest with the United Kingdom Parliament. According to the proposals of the Maltese Prime Minister 'ultimately' means a date the timing of which will be dependent on the rate of progress of the Maltese economy towards 'parity' with that of the United Kingdom.[15] 'Parity,' however, may

[12] p. 16, verbatim transcript of the Ninth Session of the Conference.
[13] Erskine May's *Parliamentary Practice,* 15th ed. (1950), p. 424.
[14] Report, p. 27.
[15] Report, para. 24.

never be reached. If Maltese representation at Westminster is granted before the power of taxation has passed to Westminster then the Maltese Members, as full members, will have a full right to debate and vote on all matters affecting the United Kingdom, including the voting of supply, and direct and indirect taxation for the people of the United Kingdom, and they will have no responsibility to their Maltese constituents, as Maltese taxation will during this period still be a matter for the Maltese Parliament. Thus Malta will have 'representation without taxation.' It may be practicable, but is it reasonable? Surely representation at Westminster should not be granted until the power to impose direct taxation on Malta has passed to the United Kingdom Parliament, which certainly will not have happened by the time of the next Parliament of the United Kingdom.

(5) How will Maltese representation at Westminster come about? Is it the intention that the House of Commons shall merely extend its present membership by three or is it intended that the representation shall be given by an Act of Union between Malta and the United Kingdom? If the latter is intended, will the Union be a permanent one, or will the Act of Union operate for a period specified by the Act, the whole matter to be reviewed on the expiration of that period?

(6) The Act of Union between England and Scotland prescribes an Oath for the security of the Church of Scotland, which Oath is taken by the Sovereign when the Accession Council meets after the death or abdication of the previous Sovereign. How is it proposed to deal with the security of the Roman Catholic Church in Malta? The Conference did not wish to involve themselves in matters concerning the maintenance of the position of the Roman Catholic faith in Malta, and have merely made general observations on the matter.[16] Quite properly, Scotland at the time of her Union with England, wanted the security of her Church safeguarded, and Malta will doubtless adopt the same attitude.

(7) The Conference recognised that a decision to grant representation for Malta at Westminster would not meet the wishes expressed to them by the representatives of a large section of the Maltese electorate, and state that it is for the Maltese people themselves to determine and to demonstrate clearly and

[16] Report, paras. 78 and 79.

unmistakably whether the proposals of the Maltese Government do indeed correspond to their own wishes.[17] How is it intended by the United Kingdom that the will of the Maltese people will be ascertained? In the same way as the will of the people in the United Kingdom is usually ascertained, namely, in Parliament? If so, then 'clearly and unmistakably' must mean that not less than two-thirds of all the members of the Maltese Legislative Assembly must be cast in favour of the proposals of the Maltese Government as required by the Constitution.[18] As regards the United Kingdom Parliament, will there be a free vote?

If the Maltese Parliament is to be ignored for the purpose of ascertaining the will of the people, then presumably a referendum will be resorted to, and what will 'clearly and unmistakably' mean then? The Maltese Prime Minister informed the Conference that he is 'quite certain and confident that if the main points of integration are accepted now, we would be able to carry at least 75 per cent of the people with us . . .'[19] As the main points are accepted, then it is arguable that 'clearly and unmistakably' should be at least 75 per cent of the electorate. But other difficulties arise. The Prime Minister informed the Conference that 75 per cent of the people over the age of 35 years are illiterate today.[20] Now a referendum is not an easy or satisfactory matter at the best of times, and the lack of education in Malta will not be a helpful factor when the United Kingdom has to make its decision. It is essential that the issues should be put before the Maltese electorate clearly and impartially, and that all interested parties should have equal opportunities to present their views, whether in favour or against. What will the United Kingdom regard as a proper referendum in Malta? It is realised that the Maltese Legislative Assembly has passed a Bill for the holding of a referendum in the course of February, 1956. But, according to reports in *The Times,* at a meeting organised in January, 1956, by the Progressive Constitutional Party, stones, eggs, and coins were thrown at the speakers, who for ninety minutes on end were unable to make themselves heard over the howls of the mob. This is a repetition of what happened at a

[17] *ibid.*, para. 80.
[18] Malta (Constitution) Letters Patent, 1947, s. 25 (3).
[19] p. 5, verbatim transcript of the Fourth Session of the Conference.
[20] p. 15, verbatim transcript of the Third Session of the Conference.

meeting organised on September 12, 1955, by the Nationalist Party, and witnessed by the writer, except that on that occasion eggs and coins were not thrown at the speakers. The Nationalist Party and the Progressive Constitutional Party are the only other political parties in Malta besides the Prime Minister's Party, and both of them are strongly opposed to integration. These unhappy events result in a denial of equal opportunities, and they are of direct importance to the United Kingdom, because they prompt the question whether the result of next months' referendum should be accepted by the United Kingdom authorities as indicating the will of the people. They are relevant matters to be taken into account when the United Kingdom authorities are making their decision on the complex and delicate issue of integration.

If a referendum for Malta, then why not one for the United Kingdom?

(8) Having regard to electoral results in the United Kingdom during the last few years, how can it be said, as the Conference do, that three Members from Malta would not be able to exploit the balance of power if Government and Opposition in the United Kingdom were evenly divided?[1] I should have thought that, from the point of view of voting strength, both the Government and the Opposition, on more than one occasion, would have welcomed the swelling of their ranks by another three members.

(9) It is assumed that the recommendation of the Conference that responsibility for Malta's affairs in London should be transferred to the Home Office is the corollary of Maltese representation at Westminster. Is the recommendation made on the basis that the organisation of the Home Office will be extended and modernised?

These are some of the questions that arise, and the more one considers the position the more one agrees with the opinion of the dissenting members of the Conference that the recommendation of Maltese membership of the United Kingdom Parliament is premature. It 'could lead to serious misunderstandings in Malta, in the United Kingdom, and possibly in those territories overseas which are directly affected by decisions of the United Kingdom Parliament.'[2]

[1] Report, para. 76.
[2] *ibid.*, p. 28.

I am convinced that the adoption of the proposals for Maltese representation at Westminster and for the transfer of responsibility to the Home Office will not bring about the closer association between Malta and the United Kingdom which all sides are anxious to create. Neither of these proposals should be accepted. The national character of the Maltese is such that only self-government within the Commonwealth will provide a final and permanent solution of their position. Once the novelty of being a part of the United Kingdom of Great Britain, Northern Ireland, and Malta had worn off the instinctive feeling of the Maltese people for self-government would reassert itself, and it would then be seen quite clearly that their integration was not a permanent solution of the difficulties. The United Kingdom should stand by the promise it made in 1951 to help colonial territories to attain self-government within the Commonwealth. Until the day for self-government for Malta arrives, I believe, with the dissenting members of the Conference, 'that revision of the list of reserved matters, development of the administrative and consultative machinery of government in Malta and in London, and continued economic aid can together result in very real progress towards the meeting of Malta's economic needs and towards that constitutional advance which is consistent with immediate realities.'[3] It would help considerably, too, if in the future the United Kingdom authorities, when dealing with the affairs of Malta, invariably accorded to the Maltese the utmost care and courtesy.

. . . .

The above paper was written having regard to the position as it existed on January 19, 1956. Since that date important events have happened and important decisions have been taken, and mention must be made of one or two of them.

The referendum referred to in point No. (7) in the above paper was held in Malta on February 11 and 12, 1956. Out of a total electorate of 153,000, 90,000 voted, of whom 67,000 voted in favour of integration; 20,000 voted against; the remaining votes being invalid. Thus, only 45 per cent of the total electorate voted in favour. As Mr. Lennox-Boyd, the Secretary of State for the Colonies, said, it is very difficult

[3] *ibid.*

to make a proper assessment of this referendum.[4] Nevertheless, it is not difficult—in fact, it is easy—to see that the result of the referendum does not entitle any one to contend that the Maltese people have themselves determined and have demonstrated clearly and unmistakably that the proposals of the Maltese Government do indeed correspond to their own wishes—as stipulated by the Round Table Conference for the adoption of the integration proposals. As the holding of the referendum and its timing were entirely within the responsibility of the Maltese Government[5] one would have thought that the Maltese Government would have had to abide by the result of the referendum and consequently withdraw its proposal for representation of Malta in the House of Commons. But that this is not so is clearly shown by the attitude of the United Kingdom Government, a word or two about which must now be said.

On March 26, 1956, a full debate took place in the House of Commons on the motion to take note of the Report of the Round Table Conference. During the weeks before this debate there had been discussions between the Government and its own supporters (many of whom dislike the integration proposals), and between the Government and leaders of the official Opposition. In his opening speech to the House of Commons the Colonial Secretary stated '. . . quite categorically that Her Majesty's Government are in favour of the proposals in the Report. This means of all the proposals, including the recommendation for Maltese representation at Westminster. There is no question of the Government accepting this Report conditionally. We accept it unconditionally. That is our position.'[6]

In his speech concluding the debate he stated that the Prime Minister had authorised him to say that he would make a statement of the Government's intention at the earliest possible moment, and that he proposed to do so before Easter.

This promised statement of the Prime Minister was made by him in the House of Commons on March 28, 1956, when he informed the House that the Government have decided to introduce a Bill to carry out the recommendations in the Report of the Round Table Conference, but that that part of the legislation

[4] Parliamentary Debates, 1956, House of Commons Official Report, Vol. 550, col. 1800.
[5] *ibid.*, col. 1788.
[6] *ibid.*, col. 1796.

relating to the representation of Malta at Westminster will be brought into operation only if and when the Maltese people have shown their desire for it in a general election after dissolution of the Maltese Legislative Assembly.

In reply to a question put to him in the House of Commons on May 2, 1956, the Colonial Secretary said he had nothing to add to the statement made by the Prime Minister on March 28, but mentioned that Mr. Mintoff had stated in the Maltese Legislative Assembly on April 4, 1956, that legislation might take about a year. The Colonial Secretary added that this is a very big business and must be most carefully done.

Until this proposed legislation is introduced it is impossible to know how the United Kingdom Government intend to deal with the situation.

11

FREEDOM OF THE PRESS IN THE COMMONWEALTH

Denys C. Holland

It is perhaps no small tribute to the power of the press that its liberty is now so widely accepted as a desirable ideal. Indeed, even States of the most widely differing political, economic and social policies find it necessary to recognise freedom of the press in some form in their Constitutions. Thus, to take two examples, the Constitutions of both the U.S.A. and U.S.S.R. guarantee freedom of the press—although by different means. The U.S.A. Constitution provides in its First Amendment that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .' The U.S.S.R. Constitution provides in Article 125 that 'In conformity with the interests of the toilers, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed: . . . (a) freedom of speech; (b) freedom of the press. . . . These rights of the citizen are ensured by placing at the disposal of the toilers and their organisations printing presses, supplies of paper, . . . and other material requisites for the exercise of these rights.'

The difference in the form of these provisions is some indication that agreement as to the desirability of freedom of the press is sometimes more apparent than real owing to differing views as to its precise meaning. That the press should be free would be accepted by most people, but free from what? The U.S.A. Constitution concentrates on freedom from legal restraint, the U.S.S.R. Constitution on freedom from capitalist control. The Indian Press Commission reports[1] that from the replies sent to a questionnaire which it circulated it appeared that (1) some people understood freedom of the press to mean freedom from legal restraint—liberty, that is to say, to publish any matter without legal restraint or prohibition; (2) some understood it to mean freedom from prejudices and preconceived notions; (3) some

[1] At pp. 357–358.

thought it meant freedom from the executive control of government; (4) some thought it consisted in freedom from the influence of advertisers, or proprietors or pressure groups, and finally (5) some thought it consisted in freedom from want—freedom from dependence on others for financial assistance.

Ideally perhaps, freedom of the press involves the existence of all five freedoms, but experience shows that this may be difficult to achieve in practice. Attempts to secure freedom from bias, from proprietors, advertisers and pressure groups, and from want ((2), (4) and (5) above) may be inspired by a hostility to a free enterprise press and lead to attempts to impose undue legal restraints and executive control ((1) and (3)) as a remedy. This is well illustrated by the Report of the Royal Commission on the Press in the United Kingdom which was published in 1949.[2] This Commission was set up to inquire into the control, management and ownership of newspapers as a result of allegations made in the House of Commons that freedom of the press was being endangered by monopoly control and the influence of advertisers being used to suppress opinion and distort facts. The Report of the Commission almost wholly vindicated the press and showed that the criticisms were themselves largely inspired by bias. To quote from the Report:

> 'We called before us several of the journalists who spoke in favour of the motion demanding the appointment of the Commission, but neither they nor the National Union of Journalists produced much positive evidence of their criticism, and some of what was produced did not stand up to examination. The Memorandum submitted to us by the Union was not a survey of the Press as a whole, but rather an attack on the right wing portion of it . . . the fact that the *Daily Worker* and the *Daily Mirror* were the only national daily papers not criticised by name, while the *Daily Herald* was scarcely mentioned is some indication of the selective nature of the document.'[3]

The desire to impose executive control as a means of eliminating the alleged bias and commercial influence, which in the event were not proven, is evidenced at a later stage of the Report where the Commission states[4]:

[2] Cmd. 7700 of 1949, published by H.M. Stationery Office.
[3] *ibid.*, at p. 107.
[4] *ibid.*, at p. 155.

> 'It was suggested that individual or joint stock ownership should be prohibited, and papers be owned by government-licensed corporations. This . . . we reject. To forbid any individual or group of individuals to publish a newspaper would in our view be an unwarrantable interference with the liberty of the individual and freedom of the Press.'

The Report of the Royal Commission clearly illustrates the division of opinion which exists as to the precise meaning of freedom of the press. If a choice has in fact to be made between freedom from want and the influence of advertisers on the one hand and freedom from legal restraint and executive control on the other hand, I for my part would unhesitatingly prefer the latter. Bias is relative and will exist in any event, but at least under a free enterprise press, the reader has a choice of biases available to him. This is in conformity with the traditional doctrine of freedom of the press in this country expounded by Lord Mansfield[5]: 'Liberty of the press' consists in 'printing without any previous licence subject to the consequences of law.'

Freedom of the press seems to me to involve principally (1) freedom to print without previous licence, (2) freedom from undue legal restraint. As the American Commission on Freedom of the Press pointed out this 'does not mean that the general laws of the country should be inapplicable to them,' and 'does not mean that special laws should not be adopted governing certain types of utterances.' All that it requires is that the laws applicable to the press, whether general or special, should not be unduly repressive or restrictive, and, in particular, should not place the press under the control of the Executive. The fact that the press is only subject to the ordinary law of the land may not in itself be sufficient if those laws are themselves repressive and particularly affect the press in practice. The existence of special press laws may or may not be a restriction on freedom according to the content of those laws. As Mons. Lopez has pointed out to the Economic and Social Council of the United Nations, 'What is objectionable is the imposition of arbitrary and unnecessary restrictions and not necessarily the restrictions themselves.'

Nobody would deny, I think, that freedom of the press, in this sense exists in the United Kingdom. No licence to print has been required since 1695, the general law of the land as it affects

[5] *R.* v. *Shipley (Dean of St. Asaph's Case)* 21 St.Tr. at p. 1040.

the press is not unduly repressive in practice, and there are few special laws applicable to the press and most of those which do exist confer advantages rather than impose disadvantages on the press. The question to be considered here is whether a similar situation prevails in the rest of the Commonwealth. I propose to consider mainly the dependent countries of the Commonwealth over which the United Kingdom has some control (including protectorates which, of course, are not strictly British territory). I shall incidentally refer from time to time to independent members of the Commonwealth, but they are not my main concern since we in this country have no control over, or responsibility for, them.[6]

LICENSING CONTROL OVER THE PRESS

In the United Kingdom great emphasis is laid upon freedom to print without licence as a vital factor in the liberty of the press. Lord Mansfield emphasises it in his classic exposition of press liberty and the Royal Commission on the Press, as we have seen, indignantly repudiated the suggestion that the ownership of newspapers should be restricted to government licensed corporations. However, in several colonies and protectorates of the United Kingdom just such a licence is requisite.

Thus, in Aden, section 5 of the Press and Registration of Books Ordinance, 1939, as amended, provides: 'It shall not be lawful for any person to print, publish or edit any newspaper within the Colony unless authorised by a licence in writing granted by the Governor and signed by the Chief Secretary, which licence the Governor may, in his absolute discretion, grant, refuse or revoke.' The licence when granted is valid for one year only. A newspaper is defined in wide terms to mean 'any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments in relation to such news, intelligence or occurrences, or to any other matter of public interest printed in any language and published in the Colony for sale or free distribution at regular or irregular intervals . . .' Clearly under this provision the Governor has absolute control over the printer, publisher and editor of all periodical publications, and no appeal

[6] For a recent review of freedom of the press in the independent countries of the Commonwealth, see 'Government Pressures on the Press,' *I.P.I. Survey*, No. IV, published by the International Press Institute, Zurich (1955).

is available against his decision. In the Federation of Malaya, a licence is needed not only to print or publish a newspaper but also to keep a printing press for use in the printing of any documents. Section 3 (1) of the Printing Presses Ordinance, 1948, provides that 'the Chief Secretary may in his discretion grant to any person in the Federation a licence to keep for use and use a press for the printing of documents, and may at any time withdraw such licence either permanently or for such period as he thinks fit.' And section 7 of the same Ordinance provides that 'no person shall print or publish or assist in the printing or publishing of any newspaper in the Federation unless the proprietor of such newspaper has previously obtained a permit in writing under the hand of the Chief Secretary authorising the printing and publishing thereof' which permit he may, at his discretion, grant, refuse or revoke, or grant subject to conditions to be endorsed thereon.' Again the licences required under sections 3 and 7 are not only liable to be withdrawn at any time without proof of any offence or even abuse falling short of an offence, but in addition annual renewal is necessary in any event. The only improvement on the situation in Adén is that in Malaya an appeal lies from the decision of the Chief Secretary to the High Commissioner in Council. In other respects the laws are more repressive in Malaya than in Aden. Thus in Malaya powers of search without warrant are conferred by sections 19 and 20 of the same Ordinance which authorise any magistrate or police officer not below the rank of inspector to search any premises if he has reason to believe that an unlicensed printing press is being kept there or that a licensed printing press is being used in contravention of the Ordinance, *e.g.*, for the printing of newspapers without a licence having been obtained under section 7. These far-reaching powers over the press enjoyed by the executive in Malaya, although introduced in time of emergency, in 1948, are not, it should be observed, conferred by emergency provisions but by the ordinary law of the land, as indeed were all the powers mentioned in this paper except where otherwise stated.

Licensing control also exists in Hong Kong where, however, as a result of protests from the Commonwealth Press Union, some modifications in the system have recently been introduced. The present law is contained in the Control of Publications (Consolidation) Ordinance, 1951, as subsequently amended.

Section 8 of this Ordinance provides that a licence shall be required for the keeping of a printing press—the granting and withdrawal of the licence to be in the absolute discretion of the Governor; there is no provision, as there is in Malaya, for any appeal against the decision. No changes have been made in this section since its introduction in 1951. However, section 16 which contains further licensing provisions was replaced by a new section 16 in 1955 as a result of the protests referred to from the Commonwealth Press Union. The original section 16 provided that the Governor in Council may by regulation prescribe or provide for, *inter alia,* 'the control whether by licensing or otherwise howsoever of newspapers, periodicals and printed documents and of the printing, publication and distribution and sale thereof.' The Commonwealth Press Union protested[7] that 'this law, vesting in the Governor absolute control of every sort of newspaper or periodical has, up to now, no parallel anywhere within the Commonwealth.' The provisions in force in Aden and Malaya seem to me to be not so dissimilar as to justify the sweeping assertion of the absence of any parallel. However, as a consequence of the protest this section was ultimately recast in 1955 by the Control of Publications (Consolidation) Ordinance, and does not now provide for the licensing of newspapers. It still, however, provides, *inter alia,* that the Governor in Council may by regulation prescribe or provide for the registration of news agencies, 'the licensing of distributors of newspapers, the prohibition of the distribution of newspapers except by licensed distributors,' and 'the registration, sale, purchase, removal, use, control and licensing of printing presses.' And since a printing press licence under section 18 may be granted by the Governor on such conditions as he thinks fit, obviously newspapers could in theory still be controlled through the issue of printing press licences.

In Kenya a temporary licensing system for printing presses was introduced in 1952 by the Printing Presses (Temporary Provision) Ordinance, but this Ordinance was only to remain in force for one year and, so far as I have been able to ascertain, it has not been re-enacted or continued in force by any other means. The scheme of control established under this Ordinance

[7] See *I.P.I. Report,* Vol. 3, No. 5 (September, 1954), p. 4, a monthly bulletin published by the International Press Institute, Zurich.

was that the licence required for keeping and using printing presses was to be refused if it appeared to the Registrar after consulting the Member for Law and Order that the press would be used for an unlawful purpose or for printing documents prejudicial to peace or good order in the Colony. This provision aroused the following comment in the World's Press News[8]: 'It gives the Member for Law and Order almost unlimited powers . . . powers at the same time so far-reaching and so vague that it cannot be accepted with equanimity by any one who cherishes the principle of the freedom of the press.' It is of some significance that this condemnation came from a special correspondent who admitted (whether rightly or wrongly) that the African press was often guilty of distortion of facts and violent anti-European sentiments. If this condemnation be accepted, it clearly applies to an equal, if not greater, extent to the system prevailing in Aden, Malaya and other countries yet to be mentioned. Further comment was aroused by a provision in the Ordinance enabling premises to be searched on the warrant of a magistrate; this power was conferred by section 15 which provided that if it was represented to a judge or magistrate that in fact or according to reasonable suspicion a printing press was being kept for use or used without a licence or in a place not specified in the licence, the judge or magistrate might issue a warrant authorising any administrative officer not below the rank of assistant inspector to enter and search that place and seize any printing presses and documents found there. These search powers were not in fact so extensive as those at present in force in Malaya where a search may take place without a magistrate's warrant, but, coupled with the licence provisions, they were regarded by African editors as sufficiently repressive to induce them to ask for a system of censorship on the ground that it would be preferable to the arbitrary controls then existing.

In Malta it is newspaper editors and keepers of printing presses, but not newspaper publishers or proprietors, who have to obtain a licence. Whereas in Aden, the only other dependency where an editor is expressly required to obtain a licence, no express conditions precedent have to be fulfilled by an applicant for a licence, in Malta the editor has to fulfil certain conditions specified in the Press Ordinance, 1933, before the discretion

[8] See *I.P.I. Report, supra.*

of the licensing authority can be invoked at all. The prospective editor must be a British subject, of full age, reside in the Islands, have had no conviction recorded against him under the Press Ordinance during the preceding twelve months, and obtain a certificate of good conduct from the police. If he fulfils these conditions he may then apply to a Board for a certificate that he is a fit and proper person to be an editor. The Board consists of the Registrar and two magistrates of the judicial police appointed by the Governor, and since it acts by a majority decision it is clear that control once again lies effectively with the Executive authorities. The licence which the keeper of a printing press requires in Malta has to be obtained from the police and again certain conditions have to be satisfied; the applicant must be a British subject, have attained the age of 18, have no conviction recorded against him under the Press Ordinance during the preceding twelve months, and in addition he has to pay a deposit of £20.

Another country where licensing provisions are in force is North Borneo, where they were introduced in 1939. In this territory the keeper of a printing press and the proprietor of a newspaper both need an annual licence and in this instance the authority to whom application is made is the Registrar who has an absolute discretion whether to grant, refuse, or revoke the licence or grant it subject to conditions. There is, however, a right of appeal to the Governor in Council. In this territory, like Malaya, powers of search, without a warrant, are granted to the police in connection with the enforcement of these provisions —sections 10A and 10B of the Printing Presses (Unification and Amendment) Ordinance, 1950, authorising any police officer not below the rank of Assistant Superintendent to search premises if he has reason to believe a breach of the Ordinance is being committed.

In Sarawak the keeper of a printing press requires an annual licence under an Ordinance of 1927. In this case the licensing officer is the Resident of a Division or any officer deputising for him, and again the granting, refusal and withdrawal of the licence are completely discretionary and there is no right of appeal of any sort.

Finally in Singapore a licence is required for the keeping of a printing press and for the printing or publication of a news-

paper. The licence for the keeping and use of a printing press is required by section 3 of the Printing Presses Ordinance, 1920, and the licence for the printing or publishing of a newspaper by section 6A, which was added by an Amending Ordinance of 1939. The licensing officer in both cases is the Colonial Secretary, who has an absolute discretion, subject in the former case to a right of appeal to the Governor in Council.

Thus, we see that the licensing system which in the United Kingdom is condemned by almost every one, exists in several United Kingdom dependencies in one form or another. In some instances a licence is required to keep a printing press, in others in order to publish or print a newspaper, in others to be a proprietor of a newspaper, in yet others to be an editor, but in all those territories where a licence is required the common feature is that the licence is in the complete discretion of Executive authority.

In no independent Commonwealth country, as far as I am aware, is such a licensing system in force. The Commonwealth countries nearly all have Registration Acts, however (which I shall deal with in connection with the Colonies shortly), and although these are purely formal Acts dealing with such points as registration and filing of newspaper copies, 'nevertheless,' as the International Press Institute has recently pointed out,[9] 'these regulations may include certain conditions which allow licensing to creep in by the back door.' As an illustration of this the International Press Institute cites the case of Hameed Nizami, the editor of the Lahore daily *Nawa-i-Wagt* whose registration was withdrawn by the Governor of the Punjab whose policy he had been attacking. 'It took months,' says the Institute, 'and the intervention of the central government, which disavowed the Governor of the Punjab, to restore the situation to normal.' The comments of the Institute on this incident form a fitting judgment on the system which we allow to exist in several of our dependent territories. 'That a publisher should be asked to satisfy certain entirely non-political formalities . . . is natural enough and acceptable; but that the right to publish a paper should depend on the whim of a public servant is outrageous.'

OTHER RESTRICTIONS ON PRESS LIBERTY

Liberty of the press depends not only on the absence of a licensing

[9] 'Government Pressures on the Press,' *I.P.I. Survey*, No. IV, at p. 82.

system, but also, I suggested earlier, on the absence of other unduly repressive laws, whether they be laws specially applicable to the press, or laws applicable to the public generally, but which affect the press in particular. In the United Kingdom, as we all know, the position is generally satisfactory in this respect too. In our dependent territories on the other hand, there are several instances of laws, press laws and ordinary laws, which either place the press at a particular disadvantage compared with other individuals or which make the press very much dependent on, or subordinate to, the will of the Executive.

REGISTRATION AND BOND REQUIREMENTS

In the first place most of our dependent territories—in fact, all except Bermuda, the Falkland Islands, the Leeward Islands and Somaliland—have Ordinances providing for the registration of particulars of publications in some form or another. Until recently Grenada also formed an exception but registration provisions have now been introduced there by the Newspaper Ordinance, 1955. The forms which these Registration Ordinances take vary slightly from territory to territory, but an example of the contents of this sort of provision is the Newspaper Ordinance, 1946, of Gibraltar, which reads: 'No person shall print or publish, or cause to be printed or published, any newspaper unless the proprietor, printer and publisher, shall each have previously made and signed, and registered in the office of the Colonial Secretary, a statutory declaration containing the several matters following: (a) the correct title or name of the newspaper; (b) a true description of the house or building wherein such newspaper is intended to be printed; and (c) the true names and places of abode of every person who is intended to be a proprietor, printer or publisher of the newspaper.' It then further provides for the delivery of copies of the newspaper to the Colonial Secretary and for the names of the printers and publishers to be printed in every copy of the newspaper. Naturally where a system of licensing of printing presses is in force, as in Aden, there is further provision for the registration of particulars of the possession of such presses, and sometimes such particulars are required even where no licensing system for printing presses is in force, *e.g.*, in British Honduras. In Barbados one finds that, as in England, joint stock companies are exempt from the registration requirements, but

this is unusual. Sometimes particulars of the editor have to be registered too, as in Antigua. Sometimes an annual return is required. In some instances powers of search are conferred in connection with the registration system, *e.g.*, in British Honduras where a Justice of the Peace may issue a search warrant if he has reason to suspect that a printing press or type is being kept in any premises without proper notice having been given of its possession under the Newspaper Ordinance, 1924. Sometimes particulars of books printed in the colony have to be registered too.

As the Indian Press Commission,[10] and the International Press Institute [11] also, have pointed out, such provisions do not in themselves amount to any infringement of press freedom. We live in an age of records and statistics. It is vital to know who is responsible for running a newspaper and where it is printed and published in case lapses occur in respect of which proceedings have to be taken. But, as I pointed out above, the International Press Institute has expressed the opinion that this registration system has its dangers of abuse and needs to be carefully watched (as was illustrated by the incident mentioned above in Pakistan). In India, for example, section 19F of the recent Press and Registration of Books (Amendment) Act, 1955, provides that 'the Press Registrar or any gazetted officer authorised by him . . . shall, for the purpose of the collection of any information relating to a newspaper under this Act, have access to any relevant record or document relating to the newspaper in the possession of the publisher thereof . . .' *The Times,* commenting on this provision recently, said[12]: 'the registration of newspapers is certainly necessary, but "this right of access" gives powers to the Registrar which could easily be abused.' In fact the words 'for the purpose of the collection of any information relating to a newspaper under this Act' would seem to prevent the power being used to control newspapers. Subject to the possibility of abuse, registration provisions would seem to be harmless, and indeed they have their parallel in the United Kingdom under the Newspaper Libel and Registration Act, 1881. However, in a great many dependent territories the provisions requiring registration of newspapers are coupled with a requirement to provide a

[10] *Report of the Indian Press Commission,* 1954.
[11] 'Government Pressures on the Press,' *I.P.I. Survey,* No. IV, at p. 82.
[12] *The Times,* January 12, 1956.

bond at the same time, as security for the payment of fines and/or damages. The precise form which these provisions take again varies slightly from territory to territory, but in its usual form provides that no person shall print or publish a newspaper unless he has previously executed and registered a bond in a certain sum (*e.g.*, in Aden 6,000 shillings) with one or more approved sureties, conditioned that the proprietor, printer or publisher shall pay any fine or penalty or damages that may be awarded for seditious or other libel. In one instance, Aden, the bond only covers damages awarded in civil cases, and not fines or penalties imposed in criminal proceedings, but this rather less objectionable type of provision is unusual. It may be said that such provisions are not objectionable in that they provide only a reasonable protection for the State and other individuals that any judgment awarded against a newspaper will not be an empty judgment. However, as the International Press Institute has recently pointed out[13] (in commenting on the position in India to which I shall refer shortly), the danger of such provisions is that 'the printer or publisher, for fear of forfeiting his deposit, may be led to interfere in editorial matters and seek to prevent the editor from printing matter which he considers perfectly "legitimate." Here is a case of pressure exerted through a third party: the printer or publisher assumes the role of unofficial censor.' In India the press itself objected to the very principle of a special law being applied to newspapers[14]: 'Are we criminal tribes,' it asked rhetorically, 'that there should be a special law for us?' These two objections may perhaps be met, and the public at the same time protected, by providing that a bond or deposit shall be required, not from every newspaper prior to publication, but only from a newspaper if and when it has been convicted of an offence and so provided evidence of its criminal tendencies. This is now the position in one of our dependent territories, Malta, where the provision in the Press Ordinance, 1933, requiring a deposit prior to publication of a newspaper was amended in 1946 so as to require a deposit to be paid only on conviction of certain offences under the Press Ordinance. This too is now the position in India. Under the Indian Press (Emergency Provisions) Act, 1933, security was demanded, as in our other depen-

[13] (1955) *I.P.I. Survey*, No. IV, at pp. 27–28.
[14] See the *Report of the Indian Press Commission*, 1954.

dent territories, prior to printing or publication of a newspaper. Now the Press (Objectionable Matter) Act, 1951, provides that security shall only be demanded on proof that objectionable matter has been printed by the newspaper. 'Objectionable' is defined to mean any words, etc., likely (1) to incite violence for the purpose of overthrowing the government, (2) to incite murder, sabotage or any offence involving violence, (3) to incite to interfere with the supply or distribution of food or other essential commodities or essential services, (4) to seduce members of the armed forces or the police forces from their duty, (5) to promote enmity between different sections of the people of India, or (6) which is grossly indecent, scurrilous, obscene or intended for blackmail. Whether matter is objectionable or not is decided by a special jury composed of persons, including journalists, specially qualified to deal with abuses of freedom of the press. This measure has aroused a storm of criticism in certain quarters, but it is undoubtedly an improvement on the position previously prevailing and, as the International Press Institute points out,[15] after itself criticising the measure, 'it must nevertheless be admitted that this law has not in fact impaired freedom of the press. It is at worst a potential threat. Furthermore, most of the Indian editors whose views have been canvassed . . . have expressed themselves as satisfied by and large with the conditions in which the press can operate in India.'

EXECUTIVE POWER TO BAN AND SUPPRESS PUBLICATIONS

Far more serious than the provisions for the giving of security,[16] however, are the laws in force in most dependent territories enabling the Executive to ban and suppress publications. These powers fall into two groups—those cases where the Executive have an arbitrary power to ban without proof of the commission of any office and those other less objectionable cases where the power to ban only arises after the commission of an offence.

Into the first group falls the power, enjoyed in at least thirty of our dependent territories, either by special Ordinance or under the Penal Code, to prohibit the importation of publications. A typical example of such a provision is the Importation of Pub-

[15] See (1955) *I.P.I. Survey*, No. IV, at p. 29.
[16] In one British territory, namely Eastern Nigeria, no bond is now required at all; see the *Eastern Nigerian Newspaper Law*, 1955.

lications Control Ordinance, 1945, as amended, in force in Aden, which reads: 'If the Governor is of the opinion that the importation of any publication would be contrary to the public interest, he may in his absolute discretion by Order in Council prohibit the importation of such publication and in the case of a periodical publication may, by the same or subsequent Order in Council, prohibit the importation of any past or future issue thereof.' 'Publication' is defined to include 'all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape, or in any manner capable of suggesting words or ideas, and every copy and reproduction of any such publication.'

In some dependent territories the wording of this power to prohibit the importation of publications is varied slightly. Thus, in Cyprus the Press Amendment Law, 1951, provides that 'the Governor in Council may by order published in the *Gazette* prohibit the importation, introduction or circulation in the Colony of any *newspaper* published outside the Colony which appears to the Governor in Council to be contrary to religion or morality or prejudicial to peace, public order or good government in the Colony.' But some such power, subject to slight variations to suit particular circumstances, is conferred in nearly all our dependent territories either by a special Ordinance, as in Aden, or by a provision in the penal code, as in the Gambia and in Zanzibar. The power is sometimes conferred on the Governor, *e.g.,* in Aden, sometimes on the Governor in Council, *e.g.,* in British Guiana, sometimes on the Resident, as in Brunei, sometimes on the High Commissioner in Council, as in Malaya, but in all of them the power is an arbitrary power enjoyed by some official of the Executive organ of Government. The arbitrary and dangerous nature of such power is well illustrated by a recent prohibition in Kenya. Messrs. Martin Secker and Warburg published last year *The Trial of Jomo Kenyatta* by Montagu Slater, an account of the trial of Jomo Kenyatta which was favourably reviewed as an unbiased record by many journals in this country. The book was banned in Kenya, and when asked why in the House of Commons, the Minister of State for Colonial Affairs said that it was because it disclosed the names of the prosecution witnesses and this might endanger their safety.[17]

[17] See *Hansard,* Vol. 542, cols. 588–589.

The publishers thereupon reprinted the book, disguising the names of the prosecution witnesses. The ban continued, and when asked for the reason, the Colonial Secretary replied[18] that he fully supported the Governor's decision to continue to ban the book as being contrary to the public interest, adding: 'It was a pity that not all the various blemishes were taken out at the same time. One has been removed, but others remain.' What the other alleged blemishes were he did not disclose. A clearer case of administrative autocracy than this it would be difficult to imagine. A list of publications prohibited in Kenya was given about the same time by the Colonial Secretary.[19]

The only Commonwealth country where similar powers of import prohibition are enjoyed, so far as I am aware, is South Africa, where 1,139 publications were prohibited from importation in 1955 alone,[20] and where the severe restrictions imposed on the press have recently aroused criticism from the International Press Institute.[1]

The power to prohibit the import of publications necessarily involves powers also to detain, open and examine packages and articles where it is suspected that they may contain prohibited publications, and the power also to punish persons who sell, distribute, reproduce or even merely possess a prohibited publication. In some cases, as in Brunei, arrest by the police without the issue of any warrant is also authorised. The power usually extends to all publications, the definition being the same as that cited above from the laws of Aden. The definition is wide: 'everything . . . in any manner capable of suggesting words or ideas,' and would seem to impliedly include such matters as gramophone records. However, in Somaliland recently[2] it has been thought necessary to make this quite clear by adding to the definition of publication 'or gramophone records or other similar means of reproducing speech.'

So far I have considered powers of prohibition in relation to imported matter only, such powers being generally present in our dependencies. However, in some few territories the powers of prohibition enjoyed by the Executive without judicial proceed-

[18] See *Hansard*, Vol. 547, col. 1180.
[19] *ibid.*, Vol. 542, col. 69.
[20] See *The Times*, January 21, 1956.
[1] (1955) *I.P.I. Survey*, No. IV, pp. 13–15.
[2] By the Undesirable Publications (Amendment) Ordinance, 1955.

ings extend to matter published within the colony or protectorate too. The territories where such powers are enjoyed are Brunei, Singapore, and, under emergency powers, Hong Kong.

In Brunei the power was given only recently by the Undesirable Publications (Amendment) Enactment, 1953, which added the words 'or publishing' to the principal Enactment of 1948, so that the Enactment now reads: 'If the Resident is of the opinion that the importation [or publishing] of any publication would be contrary to the public interest, he may in his absolute discretion by order prohibit the importation [or publication] of such publication . . .' With an extension of the powers of prohibition, the power to open packages, and the possibility of committing an offence by possession, are automatically extended too.

So, too, in Singapore, a recent Ordinance, the Undesirable Publications (Amendment) Ordinance, 1955, has amended the principal ordinance of 1938 so as to give the Executive powers to ban all publications and not merely imported publications. The Ordinance now reads: 'If the Governor in Council is of the opinion that the importation [sale or circulation] of any publication [published or printed outside the Colony or printed within the Colony otherwise than in accordance with the provisions of the Printing Presses Ordinance] would be contrary to the public interest, he may prohibit the importation [sale or circulation] . . .' Further under section 10 of the principal Ordinance a controller or authorised officer may detain, open and examine any article coming into the Colony which he has reason to believe contains or consists of a publication the importation, sale or circulation of which is prejudicial to public safety in Malaya and the maintenance of public order therein. And under section 11, persons entering Singapore may be searched for prohibited publications.

Clearly the imposition of a licensing system is closely parallel to a power to ban particular publications. The latter may, however, be said to be the more dangerous and reprehensible since it operates after the expense of publication has been incurred and introduces a greater uncertainty into the work of publishing. This is unavoidable in the case of imported publications, but not in the case of local publications.

SEIZURE AND SUPPRESSION BY JUDICIAL PROCESS

In addition to the arbitrary powers of the Executive, already mentioned, to prohibit the import of particular publications and occasionally the distribution of publications published locally too, and to seize prohibited publications, in many dependencies the courts have power to order the seizure of printing presses and the suspension of newspapers on the commission of certain offences in certain circumstances. Such powers are enjoyed—and enjoyed it must again be emphasised under permanent laws, not merely under emergency legislation—in at least the following territories: Fiji, Hong Kong, Malaya, Malta, Mauritius, the Seychelles, Trinidad, Uganda, and Zanzibar. Until recently the power was enjoyed in Cyprus too.

In Fiji, the power of suppression is conferred by section 57 of the Penal Code of 1945 which provides that whenever any person is convicted of publishing in any newspaper matter having a seditious intention (and the meaning of sedition in the Colonies, I shall consider later), the court may prohibit the publication of that newspaper for a period not exceeding one year; may prohibit the proprietor, publisher or editor from publishing, editing or writing for any newspaper for the same period; and may order the seizure and detention by the police for the same period of any printing presses used in the production of the newspaper. In Hong Kong suspension can only operate for a maximum period of six months but in other respects the power is wider than in Fiji. The relevant provisions there are contained in the Control of Publications Ordinance, 1951, as amended in 1955. Under section 4 of the 1951 Ordinance, a court or magistrate may order the suppression of a newspaper for up to six months on the application of the Attorney-General if the printer, publisher or editor is convicted of an offence of a nature prejudicial to the security of the Colony or to the maintenance within the Colony of public order, safety, health or morals. The seizure and detention of the printing presses used may also be ordered for the same period. Further by section 7A which was added by the Control of Publications (Consolidation) (Amendment) Ordinance, 1955, while an order for the suppression of publications of any newspaper is in force, the registration of any other local newspaper which, in the opinion of the Registrar, is under the same control may be suspended; there is, however, an appeal

against the Registrar's decision to the Governor in Council. And by section 7B, also added in 1955, in the same circumstances, that is, while an order for the suspension of a newspaper is in force, the Registrar may suspend the registration of any news agency whose proprietor, printer, publisher, editor or manager is connected in any of such capacities with such newspaper.

In Malta the law on this point is even more stringent for there the suspension *must,* not may, be ordered by the court in certain circumstances. The power is conferred by section 42 of the Press Ordinance, 1933, which provides that upon conviction of an author, editor or printer of a newspaper of certain offences under the Press Ordinance, the court *shall* order the suspension of that newspaper for two months, unless the editor was not a party to the conviction and shows special reasons why such suspension should not be ordered. On a second conviction the court must order the suppression of the newspaper. The offences mentioned are use of contumelious words, etc., in contempt of her Majesty, imputation of ulterior motives to the acts of the Governor, contempt towards the flag, incitement to disloyalty, vilification of the sovereign of a foreign State, obscenity, publication with intent to extort money, instigation to commit an offence, and sedition. In similar circumstances, suppression for one month or cancellation of a licence to keep a printing press may be ordered by the court under section 53.

In Mauritius, under section 397 of the Penal Code, wherever a person is convicted of sedition in a newspaper, the court may prohibit the publication of the newspaper for up to one year and may order the printing press to be used only in specified conditions or to be detained by the police for the same period. Further by section 398, 'if, on the application of the Procureur General it is shown to the satisfaction of a Judge or Magistrate that the issue or circulation of a seditious publication is, or, if commenced or continued, would be likely to lead to unlawful violence or appears to have the object of promoting feelings of hostility between different classes of the community, the Judge or Magistrate shall make an order prohibiting the issue and circulation of that publication.' In addition, 'the Judge or Magistrate may, if he thinks fit, either before or after or without service of the prohibition order on any person, issue a warrant authorising the police to break into and search any building,

place . . . specified in the Order and carry away every prohibited publication.'

In the Seychelles, the provisions are similar to, but slightly more stringent than in Fiji. Under section 21 of the Newspaper Ordinance, 1935, the court may, when a person is convicted of printing or publishing a seditious *or other libel* order the suspension of the newspaper for up to three years, prohibit the proprietor, publisher or editor from printing, publishing or writing in any newspaper for the same period, order the detention of the printing presses for the same period also, and increase the amount of the bond required from the publisher.

In Trinidad and Uganda the provisions are precisely the same as those in force in Fiji. In Cyprus, too, the provisions for suppression were the same as those in force in Fiji, save that the period for which suspension could be ordered was three years, as in the Seychelles, not one year only. This provision in Cyprus, section 11 of the Press Law, 1949, was repealed in 1954 by the Press Amendment Law. The Commonwealth Press Union has recently commented[3]: 'It is interesting to recall that in the case of Cyprus a most injudicious Ordinance dealing with "seditious publications" aroused world-wide criticism (in which the Union joined) and was repealed.' The only repeal of a sedition law in Cyprus in recent years is the one I have referred to (although the whole of the sedition laws in Cyprus were criticised at the time) and, therefore, presumably it is this law to which the Union refer. In view of the fact that similar provisions exist in Fiji, Hong Kong, Malta, Malaya, Mauritius, the Seychelles, Trinidad, Uganda, and Zanzibar (and perhaps other territories which have not come to my notice), in none of which does such an emergency exist as prevails in Cyprus, it is rather strange that only in relation to Cyprus has the law been criticised. If it was an injudicious law in Cyprus, it would seem to be even more injudicious in those other dependent territories. It may be said that in those other territories the provision is not used in practice, but that is certainly not true at least of Uganda and Zanzibar, for references to suspensions there have appeared in the United Kingdom press in recent years.

[3] *The Forty-fifth Annual Report of the Council of the Commonwealth Press Union,* 1955, at p. 6.

RESTRICTIONS ON THE POWER TO CRITICISE THE GOVERNMENT

In addition to restrictions imposed by bond requirements, licensing provisions, and powers of prohibition and suppression, the laws of dependent territories also generally define various criminal offences in terms wide enough to enable criminal proceedings to be taken against any one who criticises the government. This is particularly true of the law of sedition, a matter which has been commented on at length elsewhere[4] and on which, therefore, I do not intend to dwell here. Briefly, the position is that in the United Kingdom, sedition is committed by bringing into hatred and contempt, or exciting disaffection against the Government only if there is an intention to excite violence. In those dependent territories where sedition is a statutory offence (and this, I believe, includes all except Barbados and British Guiana) no such intention is necessary, and, therefore, any criticism which may bring into hatred or contempt or excite disaffection against the Government is seditious, even though no violence is intended or results, subject only to a saving qualification in respect of the mere pointing out of errors or defects in the government. Thus in the *Tilak Case*[5] in India, which arose prior to India's independence, Strachey, J., said: 'If a man excites or attempts to excite feelings of disaffection—great or small—he is guilty under the section [*i.e.*, section 124A of the Indian Penal Code]. It does not consist in exciting rioting or rebellion or any sort of actual disturbance great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial . . . if he tried to excite feelings of enmity to the government, that is sufficient to make him guilty under this section.' This view was confirmed by the Privy Council in the case of *Sadashiv Nayaran* v. *King Emperor* in 1947.[6] When the meaning of sedition in Cyprus became known in this country, the British press was aroused to almost unanimous protest.[7] The law of sedition, however, still remains the same not only in Cyprus but throughout British dependent terri-

[4] 8 *Current Legal Problems*, 1955, pp. 84–87.

[5] See the Report of the Indian Press Commission, 1954, for a discussion of this case.

[6] A.I.R. 1947. P.C. 82.

[7] See (1954 *I.P.I. Report*, Vol. 3, No. 5, pp. 8–9, a monthly bulletin of the International Press Institute, Zurich, from which it appears that the *Daily Telegraph* alone supported the sedition laws of Cyprus.

tories. The only law to be changed in Cyprus was that, referred to already, enabling newspapers to be suspended on conviction of sedition. A writer has recently remarked[8] in relation to the United Kingdom press that the 'proper function' of the press 'is to create trouble and uproar for those in authority when issues arise on which public opinion is deeply disturbed.' That, to my mind, should be true of the press everywhere, and it is interesting to note that in India where the definition of sedition in the penal code introduced by Britain has not yet been altered, the Indian Press Commission has recently stated that in its opinion the definition is *ultra vires* the Constitution, and, presumably out of abundant caution, has recommended its repeal; the Commission recognises, however, that inciting violence in order to change the government should still be an offence, and with this most people would agree. Not only is the definition of sedition wider in dependent territories than in the United Kingdom, but also (1) conviction of sedition may result in suppression of the newspaper as already mentioned; (2) search warrants may generally be issued for seditious literature and occasionally search even without a warrant is legal, and (3) mere possession of seditious literature is an offence unless the accused proves that he did not know, and had no reason to know, it was seditious. All of these provisions, of course, run contrary to the position in the United Kingdom.

The law of sedition in the Colonies would seem in itself to be sufficient to restrain criticism of the government, if necessary, but occasionally further laws are passed to assist in this purpose. An extraordinary example is section 142 of the Mauritius Penal Code which provides: 'any writing or printing, published in any form whatever, and in which any minister of religion, or any preacher, shall have presumed to criticise, or censure, either the Government, or any act of public authority, shall carry with it the punishment of imprisonment.' This provision may, in fact, not be enforced in practice, but, even if not, its mere existence in the statute book would seem to be objectionable; so long as the provision exists it is capable of being enforced if the desire arises.

OTHER MISCELLANEOUS LAWS AFFECTING THE PRESS

I pass finally to one of two miscellaneous press laws which have

[8] See *The New Statesman and Nation,* December 17, 1955, at p. 825.

no parallel in the United Kingdom. One such provision occurs in Malta where there is a provision in the Press Ordinance, 1933, which so far as I know, is unique in the British Commonwealth. This is section 11 (2) which provides that 'Any printed matter that, under any pretext whatsoever, directly or indirectly, divulges the means or explains the ways of preventing procreation or of arresting pregnancy or of causing miscarriage . . . shall be deemed to injure public morals.'

A more general law in dependent territories is one concerning publication of false news. In some of our territories there is a provision enabling the correction of false statements to be ordered. A typical example is section 66 of the Aden Press and Registration of Books Ordinance which provides that 'if any article, report, letter of advertisement or other statement is published in any newspaper which in the opinion of the Governor contains any statement of fact which is false or distorted he may by order require the proprietor to publish a correcting statement in the same position as the original article.' The correcting statement must now, however, contain any comment or expression of opinion, and it is a defence to a charge of refusing to publish the correcting statement to show that the original statement was true, or not distorted, or that the correcting statement was not true, or contained a comment or expression of opinion. In some territories this correcting power is made available not merely to the Governor but to any person referred to in the allegedly false statement, *e.g.,* in Cyprus. There would seem to be no threat to press liberty in these provisions and, indeed, it opens up interesting speculation as to its possible value in the United Kingdom. However, in Malaya, the power seems to be dangerously wide for there section 15 of the Printing Presses Ordinance provides: 'When the Chief Secretary has reason to believe that any statement containing an allegation of fact, appearing in a newspaper, is incorrect, he may request the publisher of such newspaper to insert . . . free of charge . . . such denial as the Chief Secretary may, in the public interest, deem necessary to publish.'

In some territories, the law goes further than mere correction and provides that the publication of false news causing public alarm shall be an offence. In British Honduras, for example, it is a petty misdemeanour to 'maliciously fabricate or knowingly spread abroad or publish, whether by writing or by word of

mouth or otherwise, any false news or false report tending to create or foster public alarm or to produce public detriment.' The word 'maliciously' probably prevents such a provision being a threat to press freedom but where, as in Malta, it is also an offence 'by the omission of ordinary diligence' to spread false news, there is perhaps a danger that newspapers will be forced into excessive caution. It is interesting to observe that in the Eastern Region of Nigeria it has recently been provided[9] that the order of a judge in chambers shall be obtained before proceedings for the publication of false news are commenced. This interposition of judicial discretion would seem to be desirable in order to prevent any danger of unnecessary harrying of the press by the government.

Finally there is the question of compelling the publication of official handouts. As the International Press Institute[10] has recently pointed out, 'compelling newspapers to publish official handouts or any other material supplied by the government is certainly one of the worst abuses of power.' The only British dependent territory, however, so far as I have ascertained, where such an obligation is directly imposed is the Seychelles where section 19 of the Newspaper Ordinance provides, 'the editor of a newspaper shall publish free of charge all official communications sent to him for publication by or on behalf of the Governor.' Since, however, there is apparently nothing to prevent the newspaper making it clear that the publication is by the Governor's order, there would seem to be no real danger here.

CONCLUSIONS

There has only been space here to deal with some restrictions on press liberty imposed by law, and no consideration has been given to those extra-legal restrictions which may fetter the liberty of the press. However, even from the few legal provisions mentioned here, it is indisputable that freedom of the press as we know it in Great Britain does not exist in many dependent territories. Whether it should do so is a matter on which opinions may well differ. Freedom carries with it responsibilities, and freedom of the press consequently must depend to a large extent on the responsibility of the press. As a result, as the Indian Press Com-

[9] By the Newspaper Law, 1955.
[10] (1955) *I.P.I. Survey*, No. IV, at p. 99.

mission has pointed out in stating that some restrictions on press liberty are necessary: 'the shape which those restrictions should take must depend on the state of the development of society in different countries.' However, as Mons. Lopez has pointed out, 'the concept of freedom with responsibility can be pushed to a point where the emphasis on responsibility becomes in effect the negation of freedom.' As *The Times* recently told the Indian Government[11] (who have in fact diminished not increased the restrictions on press freedom which existed at independence): 'if freedom is to be maintained, some risks must be taken.'

Certainly it would seem to me to be desirable that at the very least the Executive should not possess the arbitrary powers of controlling the press, independent of judicial control, which they enjoy in so many of our dependent territories at present.

[11] *The Times*, January 12, 1956.

12

RECENT DEVELOPMENTS IN AIR LAW

Bin Cheng

Two recent developments in the field of air law are of especial interest: (1) high altitude flight and (2) the signing of a Protocol to amend the Warsaw Convention on September 28, 1955, at The Hague. The Warsaw Convention of October 12, 1929, which deals with documents of carriage and the carrier's liability in international carriage by air, is doubtless the most important international instrument relating to commercial aviation. Its revision has been the subject of discussion for many years and an attempt will be made to examine the main changes brought about by the Hague amendment Protocol. As regards high altitude or interplanetary flight, it seems that, with the announcement by the United States Government on July 29, 1955,[1] and by the Soviet Government four days later,[2] of their respective intentions to launch artificial earth satellites during the forthcoming International Geophysical Year (July 1, 1957–December 31, 1958),[3] a consideration of the legal aspects of this problem should no longer be postponed.[4]

AIRSPACE SOVEREIGNTY AND EARTH SATELLITES

The Principle of Airspace Sovereignty

Article 1 (1) of the Chicago Convention on International Civil Aviation, 1944, provides: 'The contracting States recog-

[1] By Dr. Detler Bronk, President of the National Academy, and Dr. A. Waterman, Director of the National Science Foundation, on behalf of President Eisenhower. The existence of an 'Earth Satellite Vehicle Programme' was first disclosed by the U.S. Secretary of Defence Forrestal on December 30, 1946.

[2] By Professor Leonid Sedlor, Head of the Commission on Interplanetary Communications, the existence of which was made public in April, 1955.

[3] Cf. Sir Harold Spencer Jones, 'The International Geophysical Year,' 53 *The Listener* (1955), p. 231.

[4] The writer wishes to acknowledge his indebtedness to Professor H. S. W. Massey, M.SC., PH.D., F.R.S., of University College, London, who kindly read this part of the paper and made a number of valuable comments. Naturally the writer alone is responsible for the views expressed and any error which may herein be found.

nise that every State has complete and exclusive sovereignty over the airspace above its territory.' Almost identical provisions are to be found in the various multipartite treaties on civil aviation which the Convention has superseded.[5] Today, there appears to be little doubt that this principle, repeatedly affirmed in treaties and in municipal statutes,[6] is declaratory of existing international law. The territorial sphere of a State's jurisdiction, therefore, extends upwards into space and downwards to the centre of the earth, the whole in the shape of an inverted cone. This jurisdiction, it must be emphasised, is *ratione loci* in respect of the airspace and not *ratione materiae* in respect of the air therein.[7]

This territorial jurisdiction over the airspace is dependent upon a State's sovereignty over the subjacent territory, including the territorial sea.[8] In relation to territorial waters, the International Court of Justice, in the *Anglo-Norwegian Fisheries Case* (1951), held: 'It is the land which confers upon the coastal State a right to the waters of its coasts.'[9] It may be said that, similarly, it is a State's sovereignty over a portion of the earth's surface which confers upon it a right to the superincumbent airspace. It follows that there can be no airspace sovereignty over *terra nullius* or the high seas,[10] nor any claim to sovereignty over the airspace above a State's vessels[11] on, or aircraft[12] over, the high seas, or above its diplomatic premises or warships in foreign

[5] Paris Convention, 1919, Art. 1 (1) (11 L.N.T.S., p. 173); Havana Convention, 1928, Art. 1 (Hudson, 4 *Int.Leg.*, p. 2354); Madrid Convention, 1926, Art. 1 (1) (3 *ibid.*, p. 2019).

[6] See *infra*, note 14, p. 213.

[7] This distinction was made already in 1906 by Westlake, 21 *Annuaire* (1906), p. 298, but confusion persists even today.

[8] Cf. Havana Convention, 1928, *loc. cit.*, in note 5 above, Art. 1. See also Paris Convention, 1919, *ibid.*, Art. 1 (2); Madrid Convention, 1926, *ibid.*, Art. 1 (2); Chicago Convention, 1944, Art. 2.

[9] *I.C.J. Reports 1951*, p. 116, at p. 133.

[10] Cf. Art. 12 of the Chicago Convention, 1944. Limitation of space does not permit the discussion here of the legal problems raised by air defence identification zones such as those established by Canada and the U.S.A.

[11] Cf. rejection of the theory that vessels are floating parts of a State's territory in *Chung Chi Cheung* v. *The King* [1939] A.C. 160.

[12] The cumulative effect of Arts. 3 and 4 of the Italian Code of Navigation of 1942 suggests an assertion of Italian sovereignty over airspace above ships on the high seas and Italian aircraft over the high seas or over *terra nullius*. It is submitted that such a claim of sovereignty would be without foundation in international law, as the entire airspace above the high seas must be regarded as free and that above *terra nullius* as without a sovereign. Cf similarly, the draft Chilean Aeronautical Code, 1947, Arts. 4 and 5.

countries.[13] On the whole, it would appear that, where the frontiers of a State are not disputed, the delimitation of the lateral limits of its airspace does not present any unusual difficulty.[13a]

As to the upper limits of a State's territorial sovereignty, it seems, however, that there is considerable uncertainty. In view of the general acceptance of the principle of a State's exclusive and complete sovereignty over its airspace, it is not intended here to reopen the discussion, which reached its height at the turn of the century, whether airspace above a State's territory is free to all nations,[14] or whether it is free but subject to the right of self-preservation of the subjacent State,[15] or whether it is merely limited to a 'territorial belt' like the territorial sea[16] or subject to the right of innocent passage by aircraft of foreign States.[17] The problems at issue are, on the one hand, the meaning and the upper limits of airspace and, on the other hand, the status of the space beyond.

The Definition of Airspace

As to the meaning of the term airspace, it would appear that, in the absence of any legal definition or authoritative interpretation, the rule of interpretation enunciated by the Permanent Court of International Justice in the *Eastern Greenland Case* (1932) may well be followed. In that case, the Court was asked to interpret the meaning of the term Greenland used in various diplomatic documents and it held: 'The natural meaning of the term is its geographical meaning.'[18] The natural meaning of the term airspace in the Paris and Chicago Conventions is, there-

[13] Cf. ICJ: *Asylum Case* (1950), *I.C.J. Reports 1950*, p. 266.

[13a] See further the writer's 'The Right to Fly,' 42 *Grotius Society Transactions* (1956).

[14] Cf. E. Nys, 'Droit et aérostats,' II (4) R.D.I.L.C. (1902), p. 501, or 19 *Annuaire* (1902), p. 86; 21 *ibid.* (1906), p. 297.

[15] Cf. P. Fauchille, 'Le domain aérien et le régime juridique des aérostats,' 8 R.G.D.I.P. (1901), p. 414; 19 *Annuaire* (1902), p. 19; 21 *ibid.* (1906), p. 293 *et seq.*; Resolution of the Institut de Droit International, 21 *ibid.* (1906), p. 327.

[16] Cf. for instance, Hans Oppikofer, 'International Commercial Aviation and National Administration,' *Enquiries into the Economic, Administrative and Legal Situation of International Air Navigation*, L.o.N.P., 1930, No. C. 339, M. 139, 1930, VIII, p. 112: Peru, at one time, declared the freedom of the air above 3,000 metres.

[17] Cf. Westlake, Corsi, 21 *Annuaire* (1906), pp. 299–300.

[18] A/B 53, p. 52.

fore, its geophysical meaning, denoting the space where air is to be found.

Here it is worth remembering that 'air is a mixture of gases and is not a chemical compound.'[19] It is a physical phenomenon rather than a scientific definition with fixed properties. Even though half of the air in the earth's atmosphere may be below a height of 5.8 kilometres,[20] 'there is plenty of evidence for the existence of highly rarified air at four hundred miles above sea level.'[1] For that reason, Professor J. C. Cooper's statement that 'above 60 miles beyond the earth's surface (approximately 100 kilometres) what we term a vacuum exists,'[2] and his conclusion that 'the "airspace" is part of the lower atmospheric region,'[3] are both open to question.

The argument in support of this restrictive interpretation of the term 'airspace,' as used in the Paris Convention, 1919, and in subsequent international treaties, is based on the definition of aircraft in the Annexes to the Paris Convention, 1919,[4] and the Chicago Convention, 1944,[5] as 'all machines which can derive support in the atmosphere from the reactions of the air.' According to this interpretation, airspace is limited to 'the region of space where the "air" was present in . . . sufficient quantities to support flight in the balloons or airplanes which were regulated by the Convention.'[6] The same restrictive interpretation was adopted by Mr. Oscar Schachter, Director of the General Legal Division of the United Nations Office of Legal Affairs, in a paper read at the Hayden Planetarium Symposium on Space Travel.[7] This interpretation of the term airspace, which fixes the upper limits of airspace by the maximum altitudes attainable by aircraft, besides being highly artificial, raises many difficulties. First of all, the strict definition of aircraft as

19 J. R. Partington, 'Atmosphere,' 2 *Ency. Brit.*, 1945, p. 640.
20 *ibid.*, p. 641.
1 P. White, 'Atmosphere,' 1 *Chambers' Ency.*, 1950, p. 740.
2 'High Altitude Flight and National Sovereignty,' 4 *International Law Quarterly* (1951), p. 411, at p. 415; or 13 *I.A.T.A. Bulletin* (June, 1951), p. 46.
3 *ibid.*, p. 414.
4 See *ibid.*, p. 413.
5 Annexes 6, 7 and 8.
6 Cooper, *loc. cit.*, in note 2 above, p. 413.
7 'Legal Aspects of Space Travel,' 11 *Journal of the British Interplanetary Society* (1952), p. 14: 'The most reasonable rule would seem to be one that defines the air space in terms of the atmospheric elements necessary to "lift" aircraft.'

used in the Annexes to the Paris and Chicago Conventions, adopted subsequently to the respective Conventions, need not necessarily have been exclusive in the minds of the framers of the Conventions, if it were present in their minds at all. Other international agreements[8] and a number of municipal statutes[9] use definitions of the term 'aircraft' which may well be extended to cover flying machines, such as rockets,[10] which do not depend on the 'lift' from the air. Secondly, is the maximum altitude envisaged in this restrictive interpretation, the theoretical height which an aircraft, even at the drawing board stage, may attain or that actually reached? Finally, as has been pointed out in a different context, 'the maximum altitudes attained by aircraft are debatable for two reasons: (1) they are broken every month or so, and (2) the exact figures are usually classified as security information.'[11] It thus seems inconceivable that the framers of the Paris and Chicago Conventions, in using the term airspace, wished to link it with such an uncertain quantity and to fix its limits by the maximum altitude attainable by aircraft or that they wished to 'peg' the upper reaches of their national territory to such a variable factor as the latest official altitude record. If, indeed, there is a correlation between the term airspace and the strict definition of aircraft as used in the Annexes to the Paris and Chicago Conventions, the connecting link consists in, it is submitted, the word 'atmosphere' used in the definition and not in its reference to the 'lift' to be derived from the air. Airspace,

[8] *e.g.*, Pan-American Sanitary Convention, Havana, 1924, Art. 2 defines aircraft as 'any vehicle which is capable of transporting persons or things through the air, including aeroplanes, seaplanes, gliders, helicopters, airships, balloons and captive balloons' (Hudson, 2 *Int.Leg.*, p. 1508).

[9] *e.g.*, U.S.A.: Civil Aeronautics Act, 1938, s. 1, 1 (4): '"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air'; French Aerial Navigation Law of May 31, 1924, Art. 1: 'For the purpose of this law, aircraft means any vehicle which is able to rise or to fly in the air.' See similarly, draft Argentine Aeronautics Code, 1951, Art. 35; Canadian Aeronautical Act, 1919, s. 6 (1); Dominican Civil Aerial Navigation Law, 1949, Art. 3; Egyptian Air Navigation Regulation, 1935, Art. 1 (2); Guatemalan Civil Aviation Law, 1949, Art. 9. The Brazilian Air Code of 1939 (Art. 18) does not even limit the definition to machines capable of flight in the air; it includes all machines capable of flight and navigation in *space* as such. Cf. also the draft Chilean Aeronautical Code, 1947, Art. 10.

[10] Cf. *e.g.*, O. G. Sutton, *The Science of Flight*, 1949, Chap. 6, The Ultimate Flying Machine, p. 163 *et seq.*

[11] M. W. Rosen and R. B. Snodgrass, 'The High Altitude Sounding Rocket,' in R. L. F. Boyd and M. J. Seaton (ed.), *Rocket Exploration of the Upper Atmosphere*, 1954, p. 46, at p. 47.

or the atmosphere, is the frame of reference by which aircraft is defined but is not itself delimited by it. To argue otherwise would be to put the cart before the horse.

The correct interpretation of the term airspace appears, therefore, to be still the natural one of the region where air is to be found, whether ozonised, ionised or—rarified! In other words, airspace is synonymous with atmosphere, including all its various layers, the troposphere, the ozonosphere, the ionosphere and, to some extent, the exosphere.[12] Support for this view may be drawn from both international agreements and municipal statutes. In fact, the Paris Convention itself considered airspace as equivalent to atmospheric space,[13] and the terminology of the Paris Convention in this respect has been adopted in a number of municipal statutes.[14]

The Upper Limits of Airspace

Having arrived at the conclusion that airspace is synonymous with the earth's atmosphere, the question arises as to its exact

[12] See S. K. Mitra, *The Upper Atmosphere,* 1952, pp. 2–3. In other methods of classification, the stratosphere takes the place of the ozonosphere. Cf. G. P. Kuiper (ed.), *The Atmospheres of the Earth and Planets,* 1949, Introduction, pp. 2, 8. See further methods of classification, M. Nicolet, 'Dynamic Effects in the High Atmosphere," in G. P. Kuiper (ed.), *The Earth as a Planet,* 1954, p. 644 *et seq.*

[13] In Art. 1 (1) of the Paris Convention, 1919, the French and Italian equivalents of the term airspace were respectively *'espace atmosphérique'* and *'spazio atmosferico,'* in other words, atmospheric space. The Spanish text of the Havana Convention, 1928, used the term *espacio aéreo,* while that of the Madrid Convention, 1926, referred to sovereignty over the *espacio atmosférico.* Although no official text of the Chicago Convention has yet been agreed upon in French and Spanish the Lexicon published by the International Civil Aviation Organisation considers as the French and Spanish equivalents of the term 'airspace,' *espace aérien* or *espace atmosphérique,* and *espacio aéreo.* Airspace, atmospheric space, *espace aérien, espace atmosphérique, espacio aéreo, espacio atmosférico,* and *spazio atmosferico* must, therefore, be considered as synonymous and identical.

[14] Most municipal statutes follow the formulation of Art. 1 (1) of the Paris Convention. The following States use the term airspace: Chile, Costa Rica, Dominican Republic, Egypt, Guatemala, Honduras, Iran, U.S.A. The following States use the term atmospheric space: Bolivia, Colombia, Ecuador, Nicaragua, Spain. The United Kingdom Air Navigation Act, 1920, reaffirmed national sovereignty to the superincumbent 'air'; while the Brazilian Air Code of 1938 referred simply to the 'space' above Brazilian territory. The draft Argentine Aeronautical Code of 1951 asserts sovereignty over the space above Argentine territory, 'unlimited in height'; but the official commentary of this particular provision considers that it is in accordance with both the Paris Convention, Art. 1 (1), and the Chicago Convention, Art. 1 (1).

upper limit. Here it would seem that geophysicists are still uncertain of the answer, although their knowledge of the upper atmosphere has in recent years considerably increased.[15] It appears that on the fringe of the earth's atmosphere there lies a belt of considerable thickness where, because of the decreasing density of the atmosphere with increasing height, particles travelling upwards become more and more free from the risk of collision with one another. Many of these particles which soar upwards quickly turn about under the influence of gravity and fall into denser layers of the atmosphere below,[16] whilst others manage to escape into outer space.[17] The scene is not unlike that of the spray from an ornamental fountain, with some lighter particles of water being carried away in the breeze while the bulk return to the basin below. The middle of this effervescent region is taken as the base of the exosphere. One authority puts this base line or 'critical level' at between 500 and 1,000 kilometres above the earth's surface,[18] another at between 450 and 550 kilometres.[19] But, of course, it is to be understood that this base line or 'critical level' is not a sharp or well defined line in the ordinary sense of the term, its height may vary considerably according to the regions and the seasons, and its determination may involve a certain amount of arbitrariness. Indeed, this question appears to be still so highly controversial among geophysicists that some of the most eminent among them are of the opinion that it is scientifically impossible to trace the outer limit of the earth's atmosphere, if such an outer limit exists at all from the scientific standpoint.

The matter appears, therefore, supremely vague, and there can be no doubt that an international agreement fixing a precise upper limit to airspace sovereignty at a definite height, be it 100, 200, 500 or 1,000 kilometres, would be infinitely preferable. But such an agreement requires the consent of the States con-

[15] See *e.g.*, G. P. Kuiper (ed.), *The Atmospheres of the Earth and Planets*, 1949; S. K. Mitra, *The Upper Atmosphere*, 1952; G. P. Kuiper (ed.), *The Earth as a Planet*, 1954; R. L. F. Boyd and M. J. Seaton (ed.), *Rocket Exploration of the Upper Atmosphere*, 1954.

[16] Lyman Spitzer, Jr., 'The Terrestrial Atmosphere Above 300 km,' in Kuiper, *op. cit.*, 1949, in note 15 above, p. 213, at p. 222.

[17] *ibid.*, p. 241 *et seq.*

[18] *ibid.*, p. 223. Cf. Boyd and Seaton, *op. cit.* in note 15 above, and Mitra, *op. cit., ibid.*

[19] M. Nicolet, 'Dynamic Effects in the High Atmosphere,' in Kuiper, *op. cit.*, 1954, in note 15 above, p. 645.

cerned and would be binding only on those States which have agreed to it. In view of the utter failure among States to reach agreement even on the much more mature and well-established subject of the inner and outer limits of the territorial sea, once thought to be the ripest topic for international codification, the chances of any international agreement on the upper limit of the territorial airspace would appear to be more than remote. Perforce, the only criterion available and acceptable is the physical limit of the earth's atmosphere, however uncertain and ill-defined this may be. A more precise knowledge of this subject will, moreover, certainly result from the many experiments to be carried out in the forthcoming International Geophysical Year.

On this basis, the opinion may be ventured that, from the legal point of view, the upper limit of airspace, and hence of territorial sovereignty, should coincide with the above-mentioned critical level in the earth's atmosphere, if this should ultimately prove amenable to scientific calculation and ascertainment, while the exosphere, the outer limit of which appears to be even more uncertain, may perhaps be regarded as a contiguous zone, by adopting an analogy with maritime law. Assuming the height of this critical level to be 1,000 kilometres, it does not seem, however, that this assertion of State sovereignty is excessive if it is remembered that the mean radius of the earth is more than six times this distance, *i.e.*, 6,371.221 kilometres.[20] In other words, the height of a State's airspace sovereignty would be less than one sixth of the depth of its subterranean sovereignty.

The Legal Status of Outer Space

On the other hand, there seems to be no possible justification for recognising any extension of a State's sovereignty beyond the earth's atmosphere into outer space, except through effective occupation of another planet or star or parts thereof, or in virtue of a new rule, yet to be established, of international customary or treaty law, the effect of which will, however, be limited to States consenting tacitly or expressly thereto. The view has been put forward by one writer that the 'upper limit of sovereignty is so to speak determined by the law of gravity' and is to be found at the point where the earth's attraction stops.[1]

[20] C. W. Allen, *Astrophysical Quantities*, 1955, p. 105.

[1] Ming-Min Peng, 'Le vol à haute altitude et l'article 1 de la Convention de Chicago, 1944,' 12 *Revue du Barreau de la Province de Quebec* (1952), p. 277; or 6 R.F.D.A. (1952), p. 390.

The following quotation from a popular work on *Interplanetary Flight* affords a ready answer to this proposition: 'Man is still essentially a two-dimensional creature. . . . It is, therefore, perhaps not surprising that some very curious ideas persist about gravity—one of the commonest being that it ceases, more or less abruptly, at a definite distance from the earth. . . . Strictly speaking, no point in the Universe is "beyond the earth's gravity" which decreases as the inverse square of the distance and so becomes zero only at infinity.'[2]

In fact, any solution which involves the extension of State sovereignty into outer space raises formidable difficulties. Also belonging to this category is the rule proposed by Professor Cooper, who believes that the principle of State sovereignty over the airspace affirmed by the Paris and Chicago Conventions is not exclusive. He states: 'At any particular time the territory of each State extends upward into space as far as then scientific progress of any State in the international community permits such State to control space above it.'[3] This solution raises three objections. First, it gives rise to difficulties similar to those relating to the use of the science of aeronautics as a criterion of the limits of airspace.[4] Secondly, it fails to distinguish between accessibility and control. Much of atmospheric and outer space will be accessible to man long before any State will be able effectively to control it. Finally, and this objection applies to all claims of State sovereignty in outer space, it is difficult to conceive how States can extend their sovereignty into this region as such, if it is remembered that the earth is rotating at the velocity of .465 km/s at the equator,[5] at the same time, it is moving round the sun at 29.77 km/s,[6] and, in addition to these, it is sharing with the sun and the rest of the solar system a velocity of about 20 km/s relative to the neighbouring stars in the general movement of the solar system towards a point in the constellation Hercules.[7] It seems, in fact, that there is as much justification and possibility for a State to claim sovereignty over the outer space as there is ground for an individual travelling in a jet air-

[2] A. C. Clarke, 1950, p. 7.
[3] *op. cit.*, in note 2, p. 211, above, p. 418.
[4] See above, p. 212.
[5] C. W. Allen, *op. cit.*, in note 20 above, p. 105: $v = 46511$ cm/s.
[6] *ibid.*
[7] See Harold Jeffreys, 'Earth,' 7 *Ency. Brit.*, 1955, p. 830, at p. 831.

craft to claim ownership of the airspace outside his window.

In contrast to the outer space, the airspace, by reason of the earth's atmosphere forming part and parcel of our planet and rotating with it, constitutes a fixed adjunct to a nation's territory and an integral part thereof. If the same simile may be used, the airspace is like the space within a travelling aircraft, while the outer space is like that outside it. For the above reasons, the outer or interstellar space must be regarded as free. Whilst a State may claim personal jurisdiction over individuals and objects possessing its nationality, or owned by itself or its nationals, travelling in outer or interstellar space, it cannot claim territorial sovereignty over any portion thereof, unless a contrary rule of international law is, at some future date, established either by treaty or by custom. The freedom of outer space is thus closely analogous to that of the high seas. On the basis of the same analogy, it may perhaps be said that a State would have the right to prevent hovering outside its airspace,[8] especially in the fringe region, the right of hot pursuit into,[9] and the right of self-defence against any unlawful attack[10] from, outer space.

Artificial Satellites and Space Travel

It follows from the conclusions so far reached that a State would at any time be at liberty to launch rockets, artificial satellites, space stations or space ships from its own territory, *terra nullius* or the high seas into the atmospheric space above these regions or into outer space. As long as these instruments or machines can be projected into their extra-terrestrial orbits or paths without passing through the atmospheric space of any foreign State, no serious problem of international law would seem to arise directly from such activities.[11] On the other hand, if it is proposed, as seems to be the present United States plan,[12] to launch the satellites into an orbit two or three hundred miles

8 Cf. Schwarzenberger, *International Law*, Vol. 1, 1949, p. 158 *et seq.* on hovering in maritime law.

9 See the case of *The I'm Alone* (1933, 1935), 3 UNRIAA, p. 1609.

10 See the writer's *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 77 *et seq.*

11 The Soviet plan, announced in April, 1955, was to build a space station which would revolve round the earth beyond the terrestrial atmosphere.

12 As explained by Dr. Bronk and Dr. Waterman on July 29, 1955, and subsequently amplified in Brussels by Professor M. Nicolet, Executive Secretary of the International Committee of Scientists, co-ordinating the activities of the International Geophysical Year.

from the surface of the earth, then it almost becomes inevitable that these satellites will travel through the airspace of States situated along their orbits. If this were the case, the tacit or express consent of those States the airspace of which is traversed will be required in order that there may not be even a technical violation of their sovereignty.[13]

Express consent or an international agreement would naturally eliminate any doubt as to the right of passage. The question is, however, to what extent, in international law, tacit consent may be inferred. In these days when national frontiers are heavily draped by various types of curtains, it may be worth remembering that the world did once, for a relatively short spell, enjoy an extremely liberal regime in the matter of transit and communication. During the second half of the nineteenth century, the requirement of passports for entry and exit of nationals and foreigners alike was rapidly dropped by one country after another,[14] although this was reintroduced in an even more rigorous manner after the outbreak of the First World War. Having regard to this, it might perhaps be said that, to the extent that it is not expressly prohibited by either international law[15] or by the municipal law of the country concerned,[16] the entry of foreigners or objects from a foreign State is tacitly permitted. Thus in the early days of aviation, foreign aircraft were frequently allowed freedom of passage without let or hindrance.[17] Even today, meteorological balloons, which technically fall under

[13] An interesting point was raised in the *Trail Smelter Case* (1938, 1941), 3 UNRIAA, p. 1905, whether the emission of smoke from a Canadian factory which caused substantial damage in the United States, besides being a nuisance in international law, constituted an infringement of the sovereignty of the United States. The tribunal, however, considered that it was beyond its jurisdiction to decide this issue (p. 1932).

[14] Cf. Egidio Reale, 'Le problème des passeports,' 50 *Recueil La Haye* (1934), p. 89, at p. 105 *et seq.*

[15] If earth satellites can be considered as aircraft, then Art. 8 of the Chicago Convention, 1944, prohibiting the flying of a pilotless aircraft into a foreign country without the latter's permission would be applicable. The various types of earth satellites, details of which have so far been released or discussed, do not appear, however, to fall within the definition of aircraft in the Annexes to the Chicago Convention, cf. note 5 above, p. 211. Cf. also *Trail Smelter Case* (1938, 1941), *loc. cit.*, in notes 13 above, and 2 below.

[16] Cf. the more liberal definition of aircraft in many municipal statutes, note 9 above, p. 212.

[17] See 38 *Clunet* (1911), pp. 1152–1153, concerning German balloons carrying officers and photographic apparatus which flew freely over Belgium and the Netherlands in 1911.

the definition of aircraft,[18] frequently drift into foreign countries and Hertzian waves are constantly being directed at a foreign State or beamed through its atmosphere. It is true that there have been protests against the release of balloons from foreign countries and against foreign broadcasts, but essentially these protests relate to the contents of the balloons or the substance of the broadcasts rather than to any technical violation of airspace.[19]

The view may, therefore, perhaps be ventured that provided the intention to launch the artificial satellites, together with all relevant details, is communicated well in advance to all States concerned and to be overflown and no objection is raised thereto, a tacit consent may probably be inferred.[19a] The announced intention of the United States to make known beforehand the wavelength of the radio instruments to be carried in the artificial satellites and to make available to the world all the data to be

[18] Cf. notes 5 and 9 above, pp. 211–212. They would fall outside the definition in those cases where municipal statutes incorporate in the definition either the element of navigability (*e.g.*, Canada, Chile, Finland, U.S.A.) or the capability of being used as a means of transport (*e.g.*, Argentina, Brazil, Finland). The second element may, however, be liberally interpreted to include meteorological instruments.

Indeed, some of the meteorological balloons, launched from various parts of the world by the United States, in 1956, in its 'Operation Moby Dick,' and subsequently described in a United States Note (February 8, 1956) as 'miniature satellites,' measured in diameter from 30 feet to 120 feet and the larger ones among them were capable of carrying a payload of 1,500 lbs. Moreover, the course of their flight round the world, though not truly controllable, was fairly predictable thanks to the regular pattern of behaviour of the jet streams in the earth's lower atmosphere. The Soviet Union, which did not object to the passage of conventional meteorological balloons, protested (February 4, 1956) against the flight of this type of outsized weather balloons, which carried photographic and radio equipments, as well as other meteorological instruments, over its territory. See further the next two footnotes.

[19] On the position of conventional meteorological balloons, outsized meteorological balloons like those described in the preceding footnote, and propaganda balloons, see further the writer's 'The Right to Fly,' 42 *Grotius Society Transactions* (1956).

[19a] The United States undertaking of February 8, 1956, in reply to the Soviet protest of February 4, mentioned above in footnote 18, at least 'provisionally . . . to avoid the launching of additional balloons which, on the basis of known data, might transit the U.S.S.R.' shows that a mere Press release (January 8, 1956), which has not been communicated to foreign Powers, intimating such intention, would not be a sufficient basis to infer acquiescence, even though such an announcement *urbi et orbi* has raised no immediate objection from any State. The statement of the United States Secretary of State in a Press Conference on February 7, 1956, that the legal position was extremely obscure can only be taken as an euphemistic admission of a possible or technical breach of Soviet airspace sovereignty.

gathered from the experiment,[20] together with the readiness of the Soviet Union expressed three days later to co-operate in the United States project,[1] may be taken as an indication that perhaps no insuperable difficulty will be encountered in this direction.

But, in so far as the State from which pilotless aircraft (including balloons), intercontinental ballistic missiles, artificial satellites or space vehicles are launched is concerned, whether by the Government or by private individuals, a special point must be remembered. This is that 'a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction,'[2] and *a fortiori* must refrain from such acts itself.[3] It must, therefore, ensure that its own aircraft, rockets, artificial satellites or space ships, whether travelling within or outside the earth's atmosphere, must not be injurious for foreign States or their nationals,[4] and it must also ensure the same by legislation or otherwise in regard to those launched by private individuals from within its jurisdiction. Any failure in this duty would entail responsibility under international law. With this safeguard, it may perhaps be hoped that, as in the early days of aeronautics, astronautics, at this experimental stage, may yet enjoy a short spell of freedom from frontier restrictions, at least until it becomes of direct military or commercial significance.

THE HAGUE PROTOCOL TO THE WARSAW CONVENTION

The Warsaw Convention of October 12, 1929, deals with two of the most important problems involved in international carriage by air: (1) documents of carriage, (2) the carrier's liability. It is binding on 48 States, including all those of major importance in international commercial civil aviation, and continues to receive further adhesions and ratifications.[5] Despite earlier proposals and even decisions to the contrary in the Legal Commit-

[20] See Keesing's *Contemporary Archives* (1955), 14337.
[1] M. Khrushchev, in Moscow, on August 1, 1955, *ibid.*
[2] *Trail Smelter Case* (1938, 1941), 3 UNRIAA, p. 1905, at p. 1963.
[3] *Op. cit.*, in note 10 above, p. 83 *et seq.*
[4] In the explanatory section of the U.S. announcement of July 29, 1955, it was stated: 'The satellite itself will orbit around the earth for a period of days, gradually circling back into the upper atmosphere, where it will eventually disintegrate harmlessly.'
[5] See Carriage by Air (Parties to Convention) Orders, 1951–1956. Egypt adhered to the Convention in September, 1955.

tee of the International Civil Aviation Organisation,[6] the Protocol signed at The Hague on September 28, 1955, has refrained from a general revision of the Convention. The main amendments embodied in the Protocol will be briefly examined.

Scope of the Convention

Notwithstanding successive proposals to extend the scope of application of the Warsaw Convention, this has not been substantially altered by the amendment Protocol. The general rule remains that the Warsaw Convention applies only to 'international carriage' as defined in the Convention, *i.e.,* carriage the places of departure and destination of which, according to the agreement between[7] the parties, are situated within the territories of two contracting States, or within the territory of a single contracting State, when there is an agreed stopping place within the territory of another State, even if that State is not a party to the Convention. No provision is made to define or clarify the meaning of the expression, 'an agreed stopping place.'

Two interpretative provisions have, however, been introduced, defining the meaning of the terms 'High Contracting Party'[8] and 'territory.'[9] The former expression gave rise to unsuspected difficulties in *Philippson* v. *Imperial Airways Ltd.*,[10]

[6] Cf. ICAO, Legal Committee, *Minutes & Doc.,* 2nd Sess., 1948, p. 83; Committees and Sub-committees were appointed and a new Convention was drafted, but at its 9th Session, Rio de Janeiro, 1953, the Legal Committee reversed its previous decision and decided on a limited revision of the Convention, *Minutes & Doc.,* Vol. 1, p. 7 *et seq.*

[7] 'Agreement between' for the French *'les stipulations des'* has been substituted for 'contract made by,' the present English translation in the Carriage by Air Act, 1932.

[8] Art. 40A (1): 'In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State.* In all other cases, the expression *High Contracting Party* shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.' This definition is unfortunately worded in the sense that obviously denunciation is not a requisite condition of being a High Contracting Party and the second part of the definition, despite the use of the conjunctive *and,* does not apply if a State has not denounced the Convention.

[9] Art. 40A (2): 'For the purposes of the Convention the word *territory* means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible.' Cf., similarly, Geneva Convention on Rights in Aircraft, 1948, Art. XXIII (3) and Rome Convention on Surface Damage, 1952, Art. 36.

[10] [1939] A.C. 332. A majority of the House of Lords (Lord Wright, Lord Atkin, and Lord Thankerton) held that the expression 'High Contracting Parties' as used in the General Conditions of Contract of Imperial Airways, Ltd., referred to the signatories of the Convention, whether or not effectively bound by it through ratification. Lord Russell and Lord Macmillan dissented.

which led the British Government to take the extraordinary step of sending a diplomatic note to the United States Government dissociating themselves from the decision of the House of Lords,[11] while the absence of a definition of the term 'territory'[12] in the existing Convention is a potential cause of embarrassment.[13] These two interpretative clauses do not, however, affect the material scope of the Convention.

In addition, the Protocol has introduced four minor amendments to the scope of the Convention, two tending to restrict it, the other two tending to enlarge it. At present, the Convention is not applicable to carriage performed under the terms of an international postal convention (Article 2 (2)).[13a] Under the Convention as amended,[14] all carriage of mail and postal packages is excluded (Article II). Furthermore, on an optional basis, Article XXVI of the Protocol allows any contracting Party to

[11] Hackworth, 4 *Digest,* 1942, p. 373 et seq. It should, however, be pointed out that contrary to what is stated in the British Note and a general belief, the case is not conclusive on the meaning of the same expression in either the Carriage by Air Act, 1932, or the Warsaw Convention proper; for of the five judges, four (Lord Atkin, Lord Thankerton, Lord Russell and Lord Macmillan) considered that in the Statute the expression referred to States effectively bound by the treaty, and three (Lord Thankerton, Lord Russell and Lord Macmillan) were of the view that this was also the case with regard to the Convention.

[12] Art. 1 of the Convention sometimes uses the expression 'territory subject to the sovereignty, suzerainty, mandate or authority' of a State.

[13] Cf. France, Court of Appeal of Algiers: *Attias* v. *Régie Air Afrique* (24.12.1943) 2 R.F.D.A. (1948), p. 107. Carriage between Algiers and Tunis. Plaintiff sought to benefit from the provisions of the Warsaw Convention and submitted that, as Tunis was a sovereign State, she was an independent High Contracting Party in the sense of Art. 1 of the Convention. In view of the subsequent decision of the International Court of Justice in the case of *Rights of U.S. Nationals in Morocco* (1952), *I.C.J. Reports 1952,* p. 176; cf. the writer's 'Rights of U.S. Nationals in the French Zone of Morocco,' 2 *I.C.L.Q.* (1953), p. 354 *et seq.*, there is probably much force in the contention. The Court, however, rejected it as being based on a misconception of the relationship between France and Tunis and in particular the recognised power of the French Republic to represent Tunis in her foreign relations. Whatever the juridical merit of the plaintiff's contention, the Court's decision is probably more in accordance with the intention of the parties to the Convention.

[13a] Since the Convention is applicable only to 'international carriage,' the exception in practice applies to almost all carriage of mail and postal packages. To this extent, the amendment merely serves the purpose of classification.

[14] According to the Hague Protocol (Art. XIX), the revised Convention is to be known as *Warsaw Convention as amended at The Hague, 1955.* Herein, it will be referred to as 'the Convention as amended.' Unless so qualified, reference is to the existing Convention. It may further be noted that the articles of the Convention are numbered in Arabic, while those of the Protocol in Roman figures.

exclude from the operation of the Convention as amended, 'the carriage of persons, cargo or baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.' This is the sole exception to the general principle adopted at The Hague that no reservation may be made to the Protocol (Article XXVI).

On the other hand, the Hague Protocol (Article XXVI) eliminates two exception clauses at present found in Article 34, namely: (1) international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation,[15] and (2) international carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.[16] Both these amendments, which reflect the technical advance in civil air transport since 1929, are to be welcomed,[17] in that they delete two out-dated exceptions, extend the scope of the Convention, close two possible loopholes,[18] and eliminate two potential causes for increasing litigation. Rightly, however, the Protocol provides that in carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business, the requirements concerning documents of carriage do not apply (Article XVI).

Documents of Carriage

It is often forgotten, in some of the proposals for the revision of the Warsaw Convention, that its purpose is not only to unify the rules of private law concerning the carrier's liability in international carriage, but also those, as it is stated in the preamble, 'in respect of the documents to be used for such carriage.' While the total abandonment of the regulations on documents of carriage would thus be contrary to the purpose of the Convention, it is generally recognised that the present provisions are excessively encumbered with unnecessary details and that, moreover, the sanction for their non-observance is unduly severe.

Indeed, under the present system, carriers are, to some extent,

[15] Cf. Belgium, Court of First Instance of Brussels: *Pauwels* v. *Sabena* (6.5.1950), 4 R.F.D.A. (1950), p. 441; 1950 USAvR 367, which shows that this exception is to be restrictively interpreted.

[16] Cf. *Vandenburg* v. *French Sardine Co.*, 1953 US&CAvR 423.

[17] Cf. Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952, Art. 26, which also omits these exceptions.

[18] This is why the British delegation at Warsaw in 1929 opposed the inclusion of the second exception in Art. 34.

punished more heavily for failure to comply with the rules concerning documents of carriage than for their wilful misconduct, or that of their servants. While in the latter case carriers incur unlimited liability for any damage which they and their servants may have caused by their wilful misconduct,[19] in the former case, however trivial the omission, their liability in respect of any injury or damage suffered by persons or goods carried is not only unlimited but also absolute, in the sense that the injury or damage need not be attributable to an act or omission of the carriers or their servants; for Articles 3 (2), 4 (4) and 9, literally interpreted, deprive the carriers of the benefit not only of those provisions of the Convention which limit their liability (Article 22), but also those which exclude it (Articles 20 and 21). It is not surprising, therefore, that in *American Smelting and Refining Co. et al.* v. *Philippine Airlines Inc. of Manila,*[20] the Court refused to adhere to a strictly literal interpretation of the Convention, maintaining that this would lead to results which would be 'grossly unjust, harsh and inequitable and contrary to the purpose and aims of the Warsaw Convention.'[1] Under the Convention as amended, this rather anomalous situation is corrected and the penalty is merely unlimited liability, depriving the carriers of the benefit of Article 22 of the Convention only (Articles III, IV and VI).

Moreover, the requirements concerning documents of carriage have been drastically simplified. In addition, as a further step towards simplification, they are now practically uniform whether the carriage is of passengers, baggage or cargo.[2] In every case, the delivery of a document of carriage is still required. However, of the many particulars, entry of which is at present mandatory, two alone remain in the Convention as amended. First, every document of carriage must contain an indication of the places of departure and destination and, if the places of departure and destination are within the territory of a single High Contracting

[19] Art. 25. See below under *Limits of Liability, in fine.*

[20] 1954 US&CAvR 221, at p. 225 *et seq.* Omission to indicate the agreed stopping places in the air waybill in a carriage obviously international, *i.e.*, from the U.S. to Hong Kong.

[1] At p. 226.

[2] Under the existing system, a document of carriage must in each case be delivered. In addition, there are three mandatory particulars which must be entered in the baggage check, and ten in the air waybill/consignment note; but none in the passenger ticket. See *Doris Sylvia Grey* v. *American Airlines, Inc.*, 1950 USAvR 507, at p. 511; *Preston* v. *Hunting Air Transport Ltd.* [1956] 2 W.L.R. 526.

Party and there are one or more agreed stopping places within the territory of another State, there must also be an indication of at least one such stopping place. These particulars are required in order to determine whether the carriage is one falling within the scope of the Convention, as defined in its Article 1. It is to be regretted, however, that the Amendment Protocol has not introduced any provision for the purpose of defining what constitutes a 'stopping place.' Secondly, every document of carriage must contain 'a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers' for death or personal injury or in respect of loss of or damage to baggage and cargo, as the case may be.

While the wording of this mandatory notice seems much less categorical than that in the existing Convention, which provides unambiguously that the document of carriage must contain 'a statement that the carriage is subject to the rules relating to liability established by this Convention,'[3] it is to be hoped that in practice the revised requirement will lead to the adoption of a new formula in the International Air Transport Association Conditions of Carriage more meaningful to the general public than those at present in use, which, for instance, in Article 18 (5) limit the carrier's liability in respect of baggage and other personal property to $100 (U.S. currency) *per* passenger, unless a higher valuation has been declared in advance and additional charges paid. Until recently, these Conditions for the carriage of passengers and baggage contained a disclaimer clause to the effect that if the law applicable to the contract of carriage were 'British,' carriers denied all liability in respect or arising out of the carriage, whatever might be the cause of the injury, loss, damage or delay.[4] The vast majority of the public engaged in air travel within the orbit of the Warsaw Convention would hardly be, and are not, aware of the inapplicability of such

[3] See *Westminster Bank Ltd.* v. *Imperial Airways Ltd.* [1936] 2 All E.R. 890.

[4] *e.g.*, 1949 I.A.T.A. Conditions of Contract, Art. 4 (f). *Nunan* v. *S.R. Co.* [1924] 1 K.B. 223 was generally regarded as being responsible for this drastic disclaimer clause. An important reason why this has been omitted from the 1954 Conditions of Carriage is its limited scope of application after the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952.

provisions to them,[5] and it comes as no surprise to find that most passengers taking out insurance policies do not take the amount recoverable from the carrier into account.[6]

An important issue concerning documents of carriage is the negotiability of the air waybill/consignment note. In view of the complexity of the matter,[7] it was not considered possible to secure agreement on the subject at present. A new Article 15 (3) of the Convention as amended, by providing that 'nothing in this Convention prevents the issue of a negotiable air waybill,' throws open a door which has been ajar[8] and leaves the matter to individual national legislation.

Of other minor changes concerning documents of carriage, the following may be mentioned. At present, the effect of Article 4 is to lay a duty on the carrier to register all baggage carried except for small personal objects of which the passenger takes charge himself, and to deliver a baggage check therefor, on pain of incurring absolute and unlimited liability for loss or damage. Difficulties can easily arise on the interpretation of what is a small personal object, for instance, in the case of an extra fur coat. In the Convention as amended, the distinction between large and small objects is dropped and there is no longer a duty on the carrier to register the passenger's baggage. Baggage is either registered or not registered. Only in respect of the former is it necessary to deliver a baggage check.

Finally, verbal alterations in Articles 3 (2) and 9 of the Convention as amended have laid additional emphasis on the consensual element in every type of carriage covered by the Convention, whereby it is sought to prevent persons or cargo carried without the consent of the carrier from possibly enjoying a regime better than that of duly accepted passengers, baggage and cargo.

[5] Art. 23 of the Convention prohibits any provision in the contract of carriage tending to relieve the carrier of his liability or to establish a lower limit than that fixed in the Convention. The argument that Art. 18 (5) of the Conditions of Carriage represents an agreed valuation of the passenger's baggage and other personal property and, therefore, does not fall under Art. 23 of the Convention is not convincing.

[6] Cf. the Swedish and the United Kingdom replies to an I.C.A.O. questionnaire, ICAO, Legal Committee: *Minutes & Doc.*, 9th Sess., Vol. 2, pp. 159, 160.

[7] Cf. Mr. Drion's valuable report, *ibid.*, p. 51 *et seq.*

[8] Cf. Final Act of the Hague Conference, 1955, Resolution A.

Principle of Liability

The principle governing the carrier's liability has hardly been altered by the Hague Protocol. The carrier is liable for death of or personal injury to passengers (Article 17) and loss of or damage to any registered baggage or any cargo (Article 18), unless he is able to prove that 'he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures' (Article 20), or that the damage was caused or contributed to by the negligence of the injured person (Article 21).[8a]

The only amendment in this sphere, and it is of no great practical consequence, is the deletion of Article 20 (2) which, at present, in the matter of carriage of baggage and of cargo, but not of passengers, relieves the carrier of liability, 'if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.'[9] This provision in the existing Convention is an unfortunate and inept importation from the field of maritime law[10] and, besides being inequitable, is of questionable benefit to the carrier.[11] For, in doubtful cases, reliance on this defence automatically deprives the carrier of the possibility of invoking paragraph 1 of Article 20 to disprove the presumption of his liability while, in cases where no doubt exists, resort to this provision would create adverse publicity, which would be far more damaging than the payment of compensation.[12]

[8a] The applicability of Art. 21 is at present dependent on the *lex fori*. There is much to be said for unifying the rules relating to contributory negligence, as the 1952 Rome Convention on Surface Damage has done in its Art. 6.

[9] The question has been raised whether 'handling' includes that by the ground staff (McNair, *The Law of the Air*, 2nd ed. 1953, p. 197 *et seq*). But this question, which may be raised under the Carriage by Air Act, does not really arise if it is remembered that in the authoritative French text of the Convention, the term used is '*conduite*.'

[10] Cf. Brussels Convention on Bills of Lading, 1924, Art. 4 (2), Hudson, 2 *Int.Leg.*, p. 1344.

[11] Especially since it would not be applicable if such acts amounted to wilful misconduct, see below under *Limits of Liability, in fine*.

[12] Although not directly pertinent, since the scheme does not apply to baggage and cargo, Air France's 'assurance individuelle automatique' (cf. ICAO, Legal Committee, *Minutes & Doc.*, 9th Sess., Vol. 2, p. 210 *et seq.*) in respect of passengers is an indication of carriers' readiness to give maximum compensation within the Warsaw limits.

A matter of some importance is, however, the absence of any duty, under the Convention as amended, on the part of the carrier to register the passenger's baggage, unless 'he takes charge' of it (Article 4 (2), as amended). Since the presumption of the carrier's liability applies to registered, but not unregistered baggage, the carrier may well escape the effect of this presumption by refusing to accept any baggage for registration or to 'take charge' of it. Since, furthermore, the Convention prescribes no standard as regards the carrier's liability for objects of which the passenger himself has charge, although Article 22 (3) fixes the limit of his liability in this regard at 5,000 Poincaré francs, the carrier may well, in addition, avoid the application of Article 22 (3) altogether by restricting his liability in such a stringent manner that, in practice, he can never be held liable for any loss or damage, except when occasioned by delay (Article 19), even if a straightforward repudiation of all liability in all circumstances may not perhaps be compatible with Articles 22 (3) and 23 taken together. In other words, under the Convention as amended, in the matter of carriage of baggage, the passenger may find himself entirely at the mercy of the carrier, save any protection which he may receive from the hands of the applicable municipal law and Article 19 of the Convention regarding damage 'occasioned by delay.'

Limits of Liability

In return for the presumption of the carrier's liability in case of loss or damage, the Warsaw Convention limits his liability in the carriage of passengers to 125,000 Poincaré francs *per* passenger and in the carriage of registered baggage and of cargo, to 250 Poincaré francs *per* kilogram (Article 22). As regards objects of which the passenger takes charge himself, the carrier's liability is limited to 5,000 Poincaré francs *per* passenger (Article 22 (3)).

The most important amendment embodied in the Hague Protocol, apart from those relating to documents of carriage, is certainly the doubling of the limit of the carrier's liability for death and personal injuries in the carriage of passengers. It has, for some time, been felt, especially in countries with a relatively high standard of living, that the present limit of 125,000 Poincaré francs (*i.e.*, approximately £3,000) *per* passenger is grossly

inadequate, particularly in regard to non-fatal injuries. Some of the carriers, represented by the International Air Transport Association, were, however, opposed to any increase in the existing limits. It was maintained, *inter alia,* that any increase in the limits of liability might result in an increase in air transportation costs, which would have to be passed on to the passenger.[13] At the eleventh hour, however, the IATA bowed to the inevitable and decided not to oppose any increase in the limit of the carriers' liability, provided satisfactory steps were taken to clarify the meaning of Article 25 of the Convention.[13a] The Air Transport Committee of the International Civil Aviation Organisation, to which the matter was referred, produced a detailed report on the economic aspect of the subject,[14] and recommended that the limit should be raised by 50 per cent. to 187,500 Poincaré francs. It was pointed out that, at the moment, even a 100 per cent. increase of the limit would probably mean an increase in insurance premiums of not more than 1/5 of 1 per cent. of the current average operating cost on international air services,[15] and that the insurance cost should further decline with every improvement in the accident rate. It would not appear, therefore, that the doubling of the limit to 250,000 Poincaré francs in the carriage of passengers by the Hague Protocol is likely to affect the long term development of international air transport.

On the other hand, while the Hague Protocol has nominally left unaltered the present limit of 250 Poincaré francs *per* kilogram of registered baggage and of cargo, it has, by the insertion of a new sub-paragraph to Article 22 (2), in fact lowered this limit by an appreciable margin, at least if regard is had to the practice of some carriers. Under the present Convention, it is uncertain—and practice in this regard varies—whether the limit of 250 francs per kilogram applies to the weight of the *object* lost or damaged,[16] the weight of the *package* from which the object is lost or damaged, or the *total weight* of a passenger's

[13] See letter from I.A.T.A. Director-General to I.C.A.O., August 6, 1952, ICAO, Legal Committee, *Minutes & Doc.*, 9th Sess., Vol. 2, p. 173 *et seq.*

[13a] See 22 *IATA Bulletin* (December 1955), pp. 38, 57 *et seq.*, 66 *et seq.*, and below.

[14] ICAO, Legal Committee, *Minutes & Doc.*, 9th Session, Vol. 2, p. 127 *et seq.*

[15] At p. 133.

[16] Cf. Berne Conventions for Transport by Rail (1928), Goods (Art. 29), Baggage (Art. 31); similarly in those of 1952.

registered baggage or a shipment of cargo covered by a single document of carriage. The last solution, which is the most favourable for the passenger or the consignor, is that specified in the Italian Code of Navigation of 1942 (Article 952) and also that adopted by many carriers.[17] The new Article 22 (2) (*b*), by specifying that 'the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned' has, therefore, in relation to these carriers, considerably reduced the effective limit of their liability in the sense that they will be in a position to revise their practice.[18] In its favour, it may be said that the solution adopted at The Hague avoids penalising the carrier for permitting passengers travelling in a group to pool their free baggage allowances, and facilitates the procedure of dispatch of goods by removing the chief incentive to insisting on a separate air waybill/consignment note for each package of cargo, as the carrier has a right to do under Article 7.

In addition, a new paragraph (4) has been added to Article 22, which allows national courts, in accordance with their own law, to exclude, in part or in whole, from the limits of the carrier's liability, court costs and other expenses of the litigation incurred by the plaintiff. While the effect of this provision may perhaps be merely declaratory in character (cf. Rome Convention on Surface Damage, 1952, Article 20 (10)), its application may vary considerably from country to country. The proviso in the same paragraph that 'the foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later,' which amounts to a new and additional limit of the carrier's liability, seems, however, to strike a sensible compromise between the interests of the parties and would have the salutary effect of discouraging unreasonableness and litigiousness on either side.

[17] Cf. France, Court of Appeal of Paris: *Air France* v. *Nordisk Transport* (28.2.1953), 7 R.F.D.A. (1953), p. 105; see also H. Drion, *Limitation of Liabilities in Internation Air Law*, 1954, p. 166 *et seq.*

[18] The limit of liability in regard to objects of which the passenger himself has charge has not been altered. See, however, above *Principle of Liability, in fine.*

The one provision in the Warsaw Convention which has given rise to most litigation is Article 25, not so much because of any insuperable difficulty in its interpretation, as is so often maintained, but because it is obviously the easiest point at which to break the 'limit barrier.' Under Article 25, the carrier loses the benefit of those provisions of the Convention which limit or exclude his liability if the damage is caused by his wilful misconduct [19] or that of his servants [20] and agents. The drafting history indicates that although the authoritative text of the Convention is in French, which speaks of 'dol ou une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol,' what the Conference had in mind was largely 'wilful misconduct.' It is, therefore, interesting to observe that in a number of cases, courts on the Continent have referred to the notion of 'wilful misconduct' in English law.[1] Under the Hague Protocol, Article 25 has been amended to read as follows: 'The limits of liability specified in Article 22 shall not apply, if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.' What is represented by this notion appears, in a sense, to be narrower than the concept of wilful misconduct and, *a fortiori,* the French notion of *'faute lourde équivalente au dol,'* in that what is required is not merely an intention to commit the incriminated act, but also either an intention to inflict damage, or at least the doer's knowledge that damage would probably result, neither of these two last-mentioned elements being required in either wilful miscon-

[19] Cf. *Horabin* v. *B.O.A.C.* [1952] 2 All E.R. 1016. Barry, J., in his direction to the jury said with reference to the last part of Art. 25: 'You need not trouble about the latter phrase, because in the law of this country a default or an omission to do something can be just as much misconduct as the doing of something which is wrong' (at p. 1019).

[20] See Civil Aviation Act, 1949, s. 54.

[1] Cf. *e.g.*, France, Court of Appeal of Paris: *Air France* v. *Nordisk Transport* (28.2.1953), 7 R.F.D.A. (1953), p. 105; France, Civil Tribunal of the Seine: *Veuve Gallais* v. *Société X . . .* (28.4.1954), 8 R.F.D.A. (1954), p. 184. See, however, Belgium, Brussels, Court of First Instance: *Pauwels* v. *Sabena* (6.5.1950), 1950 USAvR 367; France, Court of Appel of Paris: *Hennessy* v. *Air France* (25.2.1954), 8 R.F.D.A. (1954), p. 45.

duct[2] or '*faute lourde*.'[3] It is, however, wider than the exception to the limit of liability contained in the 1952 Rome Convention on Surface Damage which speaks of 'damage . . . caused by a deliberate act or omission . . . done with intent to cause damage' (Article 12). Moreover, in practice, this notion may prove wider than the concept of wilful misconduct in that it is no longer necessary to show that the author of the act, when he did it, was 'aware that it was a wrongful act, *i.e.*, that he was aware that he was committing a misconduct.'[3a]

One of the reasons for this change is the belief that by abandoning the technical terms used in Article 25 and paraphrasing them, much of the difficulties attending its application would disappear and that it would be easier to achieve uniform interpretation. The futility of this belief is shown by two New York decisions arising out of the same aircraft accident. In *Ritts* v. *American Overseas Airlines, Inc.*[4] before the U.S. District Court, Southern District of New York, a jury absolved the defendant carrier of all liability in accordance with Article 20 (1) of the Convention on the ground that he and his servants had taken all reasonable and necessary measures to avoid the damage or, at least, that it was impossible to take such measures. On the other hand, in *Goepp* v. *American Overseas Airlines, Inc.*[5] before the Supreme Court of New York County, a jury by 10–2 found the carrier, in respect of the same accident, guilty of wilful misconduct under Article 25 of the Convention and returned a verdict of $65,000 in favour of the plaintiff.[6] It

[2] Cf. *Horabin* v. *B.O.A.C., loc. cit.* Barry, J., in his direction to the jury, gave the example of the motorist who wilfully passed traffic lights when they were against him. 'He did not intend to kill any one or to injure any one coming out of the side road. He thought that in all probability nobody would be coming out of the side road. None the less, he took a risk which he knew he ought not to take, and in those circumstances he could be rightly found to have committed an act of wilful misconduct' (at p. 1020). Cf., however, the following U.S. decisions: *Ulen* v. *American Airlines, Inc.*, 1949 USAvR 338; *Ritts* v. *American Overseas Airlines, Inc.*, 1949, *ibid.*, p. 65; *Pekelis* v. *Transcontinental & Western Airlines, Inc.*, 1951, *ibid.*, p. 1; *Jane Froman et al.* v. *Pan American Airways, Inc.*, 1953, *ibid.*, p. 1; *Grey* v. *American Airlines, ibid.*, p. 60.

[3] Cf. France, Court of Appeal of Paris: *Hennessy* v. *Air France* (25.2.1954), 8 R.F.D.A. (1954), p. 45.

[3a] *Horabin* v. *B.O.A.C., loc. cit.*, at p. 1019.

[4] 1949 USAvR 65.

[5] 1951 USAvR 527.

[6] The defendant moved to set the verdict aside as against the weight of evidence, or alternatively, to reduce the verdict to the Warsaw limit of $8,300. These motions were denied. *Ibid.*, p. 529.

is true that subsequently before the Appellate Division of the State of New York, the jury verdict was modified to the Warsaw limit of $8,300,[6a] but these two decisions should sufficiently show that in order to achieve uniformity in the interpretation of the Convention, more than mere verbal changes will be required. Short of an international jurisdiction, greater attention by national courts[7] and aviation lawyers everywhere[8] to an international and comparative, instead of a purely nationalistic, approach to air law in general would probably lead to more positive results.[9]

Finally, two minor amendments in the Protocol probably deserve mention. First, whilst the matter appears to be already governed by Article 24 of the existing Convention, it is probably wise[10] for the Protocol expressly to state that the rules and limits of liability extend also to servants and agents of the carrier acting within the scope of their employment (Article 25A). Secondly, it is no doubt only equitable to lengthen, as the Protocol has done, the periods allowed for giving notice of any loss of or damage to baggage and cargo, which at the moment are exceedingly short and very severe for passengers and consignors.

In sum, it may be said that the Protocol appears to have effected a reasonable revision of the Convention. It has cut away much of the dead or dying wood from the Convention, removed some anomalies, and clarified some ambiguities, even though not always with the same success. From the consumer's point of view, it has slightly widened the scope of application of the Convention, eliminated some out-dated grounds for the exemption of the carrier's liability, lengthened the periods for notifying complaints and, above all, doubled the limit of liability for death or personal injury. From the carrier's point

[6a] 1952, *ibid.*, p. 486, confirmed by Court of Appeals, State of New York, 1953, *ibid.*, p. 503.

[7] Cf. the welcome trend indicated by *Parke Davis & Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* [1954] A.C. 321 and *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402.

[8] It may be of interest to note that an optional course on International and Comparative Air Law was introduced at University College, London, in 1953. The London Institute of World Affairs awards a Diploma in International and Comparative Air Law after examination. Cf. 3 *Journal of the Society of Public Teachers of Law* (1955), p. 59 *et seq.*

[9] Cf. Resolution E of the Final Act of the Hague Conference, 1955, which recommends the study of the problems 'involved in the promotion of uniform interpretation of the international private air law conventions.'

[10] Cf. *Adler* v. *Dickson & Wallis* [1955] 1 Q.B. 158.

of view, his task is greatly facilitated by the drastic simplification and streamlining of the rules concerning documents of carriage, his responsibility alleviated in the matter of registration of baggage, his liability for breaches of the rules concerning documents of carriage reduced, a new limit, however contingent, set to any liability which he may incur under national law for the plaintiff's court costs and other legal expenses and the exception to the limitation of his liabilities more elaborately defined and possibly narrowed. A way has even been opened for him to escape practically all liability in the carriage of baggage. It would seem that these advantages should induce the carriers to favour an early adoption of the Protocol.

From the standpoint of the United Kingdom Government, which took part in the Hague Conference but did not sign the Protocol, the fact that the proposal for a general revision of the Convention, in which members of the British delegation took an exceedingly active part, was abruptly abandoned [11] may seem frustrating. But it would appear that the amendments effected by the Hague Protocol follow closely those introduced by the United Kingdom Government into the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952. In fact, this Order has often been cited as the example for a limited revision of the Warsaw Convention. As regards the limit of liability for death or personal injury, which remains at 125,000 Poincaré francs in the Non-International Carriage Order, an increase of 100 per cent. was in fact put forward as the official British view in 1946 at a meeting of the *Comité International d'Experts juridiques aériens* (CITEJA) in Cairo. It is, therefore, to be hoped that the United Kingdom and other contracting parties to the Warsaw Convention will, if they have not yet done so, sign and in due course ratify the Protocol. The high number of ratifications (thirty) which is required to bring the Protocol into operation (Article XXII) should be a sufficient safeguard that States accepting the Protocol would not lose the benefit to be derived from the present wide acceptance of the Warsaw Convention.

[11] See above, note 6, p. 221.

13

THE PROVINCE OF THE DOCTRINE OF INTERNATIONAL LAW

GEORG SCHWARZENBERGER

THE last work [1] of Van Vollenhoven, a great Netherlands scholar in the fields of Eastern and International Law, has a message for the present generation of international lawyers. One of the intriguing features of this stimulating book is that its writer traced the stereotyped patterns of 'Hopes Raised' and 'Hopes Dashed' in the doctrine of international law during each of the great inter-war periods.

It would be pertinent to probe more deeply into the reasons for this disturbingly perennial phenomenon.[2] Yet, at this stage at least, Van Vollenhoven's pattern may be accepted as accurate and serve as explanation why this particular lecture is delivered at this particular time.

Van Vollenhoven's periods of 'Hopes Raised' coincide with those immediately before and after the termination of major wars, and those of 'Hopes Dashed' with pre-war periods. Since the Second World War, more than a decade has passed. Thus, this appears a suitable time to reassess the place and province of the doctrine of international law. If the need for this task were not apparent, a bouquet of quotations from the writings of eminent representatives of contemporary doctrine in the closing years of the last world war and the immediate post-war period would drive home the point. Use of this material would certainly reinforce the validity of Van Vollenhoven's thesis. The emphasis of this paper, however, is meant to lie on the constructive tasks which, in present-day world society, the doctrine of international law can usefully attempt to perform.[3]

1 *Du droit de paix: De Jure Pacis*, 1932. (English translation by W. H. Carter under the title *The Law of Peace*, 1936.)

2 See below, p. 250 *et seq.*

3 As it is not the purpose of this paper to single out individual writers whose works, in a sense, have provided the negative inspiration of this paper, such references will be limited to the barest minimum.

LOCATING THE POSITION OF THE DOCTRINE OF INTERNATIONAL LAW

In order to avoid rationally uncontrolled subjectivity on the legitimate tasks and functions of the doctrine of international law in our age, it is advisable to locate its exact position in relation to other agencies within the realm of international law and in the wider field of international studies.[4]

In so far as the first aspect of the problem is concerned, extreme positions have been taken. In a perhaps somewhat self-centred manner,[5] representatives of the doctrine of international law have accustomed themselves to refer to their spiritual forebears, be they Italian, Spanish or Dutch, as fathers of international law or they have ventured to visualise themselves as 'sources' of international law. By way of contrast, the judgments and advisory opinions of the World Court, as distinct from the separate opinions of individual judges, have refrained with pointed consistency from any mention of the 'teachings of the most highly qualified publicists of the various nations.'[6]

In attempting to establish the place of doctrine in relation to the World Court and other relevant agencies and, what is still more important, to international law itself, it is advisable to dispense altogether with the term *source*. It is merely a metaphor, and this image has acquired so many meanings and made necessary such artificial distinctions, as between formal and material sources, that it had better be discarded. Article 38 of the Statute of the World Court provides the clue to a different terminology which corresponds more closely to the letter and spirit of the nearly universal rules laid down in this article, and appears to contribute more incisively to the better understanding of the issues before us.

In Article 38, three law-creating processes are enumerated: treaties, international customary law and the general principles of law recognised by civilised nations. The strength of this enumeration does not lie in the description of these processes. In the case of international customary law, this description is manifestly deficient. The significance of this enumeration lies in its exclusive character. Rules of natural law, municipal law, maxims

[4] On this aspect of the matter, see below, p. 250 *et seq.*
[5] See below, p. 247 *et seq.*
[6] Article 38 (1) (d) of the Statute of the World Court.

and the like, *as such,* are banned as law-creating processes of which the World Court may legitimately avail itself. In order to be acceptable, any such rules must receive the hall-mark of one, or more, of these three law-creating processes.

By way of contrast, the practice of the subjects of international law, courts—international and municipal—and doctrine form 'means for the determination'[7] of the rules of international law. They may be called law-determining agencies. Individual States, courts and writers are but elements of their respective agencies. Their function is to furnish the necessary evidence that an asserted rule bears the hall-mark of one, or more, of the three law-creating processes. It must, however, be remembered that each of these agencies is composed of more or less fallible human beings, and these cannot be taken to be passive agents who merely reflect true international law as it were in a faithful mirror.

The subjects of international law form the principal law-determining agency, and courts and writers the two subsidiary law-determining agencies. According to the scope claimed for any particular rule of international law, the composition of the principal agency may vary from the totality of all subjects of international law to those relatively few of them who may be required to give to a rule the character of regional international law.

If, in relation to any particular rule of international law, unanimity exists within the ranks of the principal law-determining agency, the distinction between law-creating processes and law-creating agencies is reduced to one of emphasis. In the one case, it is on the process which has led to the authentication of an asserted rule as an established rule of international law. In the other, it is on the human agency which has been responsible for the creation of the rule in question. The typical situation, however, is not one of agreement, but of disagreement in each of the three law-determining agencies on the scope and contents of individual rules of international law. Thus, corresponding to the volume of discordance between the elements of the various law-determining agencies, the distinction between law-creating processes and law-determining agencies

[7] *Ibid.*, under (d). This sub-paragraph deals only with the subsidiary law-determining agencies of courts and writers. By implication it postulates a principal law-determining agency, that is to say, the subjects of international law.

becomes more absolute. Then, the problem arises whether, and how, hierarchical order between these elements can be established. As has been shown elsewhere,[8] this object can be attained by reference to three tests: the generic and individual independence of the element concerned, its international character and its technical competence.

By these tests, the pronouncements of international courts and tribunals, and especially the World Court, appear to have every advantage over teachings and writings of any individual representative of the doctrine of international law, however distinguished. Such hierarchy, however, is neither preordained nor immutable. Both judicial institutions and individual writers are but elements of subsidiary law-determining agencies. The presumption in favour of the higher rank of international judicial institutions in this hierarchy entitles their findings to be examined with sympathy and respect. Yet while isolated lapses from grace may be overlooked in the case of any imperfect mortal, the exalted position of international judicial institutions stands and falls with the intrinsic merit of their work.[9] Even the World Court is merely an element of a subsidiary law-determining agency. This position necessarily rules out blind acceptance of its authority, which can be of a persuasive character only for anybody but the parties to a contentious case.[10]

At the same time, the very existence of the freely admitted hierarchy of courts in relation to doctrine throws out a constant challenge to each representative of the doctrine of international law to emulate the most distinguished element of this other subsidiary law-determining agency. While this cannot mean uncritical adulation of their more problematic pronouncements, it demands absolute compliance with the much more severe and, in the long run, more rewarding tests which are implied in

[8] (1947) 60 *Harv.L.R.*, p. 550 *et seq.* For a further development of these views, cf. the writer's *International Law,* Vol. 1 (3rd ed.—in the press), Introduction and Chap. 2.

[9] See further (1951) 4 *Current Legal Problems,* p. 1 *et seq.*

[10] Article 59 of the Statute of the World Court.

In form, the character of *res judicata* does not attach to Advisory Opinions of the World Court. In practice, however, international institutions which had made requests for such opinions invariably complied with them. The 'package deal' on the admission of sixteen new members by the United Nations in 1955, which, on legal grounds, is hard to square with the Court's A.O. on 'Admission to Membership' (*I.C.J. Reports, 1948,* p. 51 *et seq.*) constitutes the first serious break with this tradition.

Article 38 of the Statute of the World Court: uncompromising independence, an international outlook undeflected by any particular 'cause,' and unceasing efforts at more complete mastery of one's own chosen subject.

Once the relative position of doctrine is established in this landscape of paper mountains of State papers, judgments and learned works, it is possible to proceed with some confidence to the task of mapping out the province of doctrine in the realm of international law. The fact that others may have purported to settle such frontier problems with effect *in rem* cannot relieve any scholar of his own personal responsibilities. In any case, law is not a static phenomenon, but an ever-continuing process. Its field shrinks and expands, and legal studies must constantly adapt themselves to this fluid situation.

Perhaps, in the conditions of the mid-twentieth century, the greatest benefit that we may still derive from the study of the great naturalists of the sixteenth and seventeenth centuries is to appreciate the pioneering spirit in which they approached their work and the comprehensive view which they took of their task. While they had all the competence of the technically skilled lawyer, they were not content to take refuge in the safety of minor controversies. They had the intellectual courage to make their own contribution to the major issues of their time and, if they felt bound in conscience to take a strong line, to throw discretion to the wind.

It would be fallacious to think that it was easier to be a pioneer then than it is now. Then, as at any other time, the compact majority of lawyers was not represented by men of the stature of a Vitoria, Gentili or Grotius, but by the perennial figure of the Professor of Helmstadt and other outstanding 'successes' in their own time, who did as much harm as they could to those whose message was '*contraire, en bien des choses, à leurs préjugés et à leurs intérêts.*'[11] It is as easy to be a Grotian today as it was difficult to be a heretic three centuries ago. Yet, the story has its compensations. Who still remembers even the name of the worthy Professor of Helmstadt?

To attempt to live up to the standards set by the masters in the field of the doctrine of international law does not necessarily

[11] Cf. Barbeyrac. Preface to *Le Droit de la Guerre et de la Paix par Hugues Grotius*, 1768, Vol. 1, p. v *et seq.*

mean to perpetuate reverently the traditions established by these thinkers. It means to face the problems of our own age in their spirit of independence, boldness and perception. The tasks ahead for the doctrine of international law can be set out in three words: analysis, synopsis and guidance.

I—ANALYTICAL TASKS

The basic thesis of the need for a radical change in emphasis from the use of deductive and eclectic methods to the inductive treatment of international law does not appear to require any restatement.[12] It may, however, be timely to take up the argument at this point and to deal with two aspects of the matter which require attention: the phenomenon of inductive mimicry and the place of deduction in the inductive approach to international law.

Inductive Mimicry

It would be unduly optimistic to assume that reliance on deductive and eclectic reasoning had vanished entirely from the doctrine of international law. In appearance at least, however, a noticeable change appears to have come over more recent works of distinguished writers and editors. They have become adorned with an impressive apparatus of references to judicial and diplomatic material. If hypotheses which such authors consider to represent *lex lata* did not previously purport to rest on foundations of inductive research, but are borne out by inductive evidence supplied *ex post facto,* the retrospective character of the operation is innocuous. If, however, deductive speculations or desirable developments *de lege ferenda* are presented as *lex lata,* and the inductive evidence is selectively chosen, this technique may be fairly described as inductive mimicry.[13]

Thus, in two well-known treatises, in which distinguished authors have expounded somewhat sweeping doctrines of the prohibition of abuse of rights in international law, strong reliance

[12] Cf. *loc. cit.* above, note 8.

[13] Cp., for instance, Kelsen's *Principles of International Law,* 1952, with his 'Theorie générale du droit international public' (1932) 42 *Hague Recueil,* p. 117 *et seq.* or some of the relevant aspects of the work of the International Law Commission. On this, see further Cheng, 'The International Law Commission' (1952) 5 *Current Legal Problems,* p. 266 *et seq.*

is placed on the case of the *Portendick Claims* (1843).[14] The case is meant to provide evidence for the illegality of peacetime blockades by a government of its own national ports. Actually, this question is part of the wider issue of the right of free access to ports by foreign merchant ships, if not men-of-war, in time of peace. Some evidence exists in favour of such *jus aequum* as the result of a multitude of defunct treaty clauses which, subsequently, were considered redundant. Yet, hardly sufficient research has been carried out on this question to permit more than the conclusion that a *prima facie* case in favour of such a rule has been made out.[15]

However this may be, the case of the *Portendick Claims* is singularly ill-suited to support the contention of the prohibition of the peacetime blockade of national ports on the ground of abuse of rights. In the first place, no reasons were attached to the award. Secondly, both parties had agreed expressly in advance that the award was to be an equitable settlement of the dispute and 'not even by inference' to prejudice the legal position taken up by either party on the issues involved. Thirdly, the British claims, which the award sustained, rested on the double argument of the French blockade having been a wartime blockade, which, under international customary law, required notification, and on the binding effect of assurances given by French official quarters. To make matters worse, the subsequent award on the *Closure of the Port of Buenos Aires* (1870) was fully reasoned and to the opposite effect,[16] as were the awards in two other arbitration cases.[17]

The law-creating process of the general principles of law recognised by civilised nations invites inductive mimicry of a different kind: the use, and adaption *ad hoc,* of legal maxims. Even within the folds of municipal law, maxims are likely to be misleading over-generalisations from legal principles, which themselves are abstractions from legal rules.[18] Thus, they are

[14] La Pradelle and Politis, *Recueil des Arbitrages Internationaux,* Vol. 1, p. 512 *et seq.*

[15] See further *The Fundamental Principles of International Law,* Chap. 5 (*Hague Recueil,* 1955) and below, p. 246.

[16] *Loc. cit.,* above, note 14, Vol. 2, p. 63 *et seq.*

[17] *The Toucan Case* (1851), Moore's *International Arbitrations,* Vol. 5, p. 4616, and *The Poggioli Case* (*compromis* 1903), Ralston's *Venezuelan Arbitrations,* p. 847 *et seq.*

[18] See below, p. 243.

abstractions in the second degree. The more general the maxim, the more suspect it necessarily is. Maxims are still less reliable guides to the actual rules in fields in which conflicting maxims compete with each other. If maxims are torn out of their original context in any system of municipal law and transposed into the international field, they become a conspicuous illustration of law-making in disguise.

An example *par excellence* is provided by the maxim *ex injuria jus non oritur*. In the various systems of municipal law, this maxim has very different meanings. Even on this level, it is subject to the overriding rule of its opposite: *ex facto jus oritur,* for hardly anywhere does any legal system exist which does not derive its ultimate origin from a successfully accomplished revolution.

For the sake of argument it may be assumed, although not granted, that both maxims are eligible as general principles of law recognised by civilised nations. We are then left with two competing maxims. Their scope can be ascertained only by reference to the relevant underlying rules. In this case, reliance on either of these maxims is redundant. The only alternative would be to take these maxims seriously. This would mean that the process of balancing conflicting rules, which itself has an inevitable element of subjectivity, however strongly controlled, would be transformed into a still less verifiable juggling game with maxims on a level of subjectivity unlimited.

It is even possible to refine this technique by way of suggestive references to more restrained pronouncements of individual elements of law-determining agencies. While these are not likely to go all the way, it is frequently possible to argue that they point in the desired direction. Provided that the maxim in question is sufficiently general and abstract, this task does not prove unduly difficult.

Once exercises of this kind are seen in their true nature, they have their uses. Resort to them serves warning of the *prima facie* suspect character of the legal rule or principle asserted and the real functions which such maxims are, then, made to fulfil. As has been so frequently the fate of natural law, so maxims, meant originally to be helpful devices for purposes of teaching and memorising, may be degraded into legal disguises of intrinsically political postulates. It is against this type of

unholy mixture of law and politics[19] that the doctrine of international law requires to be immunised.

The Inductive Treatment of the Principles of International Law

It is sometimes suggested that what is required in the study of international law is the application of both inductive and deductive methods, the one to establish the contents and range of individual rules, and the other to cope with international law on the level of first principles. Although in appearance bearing all the signs of the Geneva spirit in a state of co-existence and apparent stalemate, any such compromise would mean in effect the re-enthronement of eclecticism.

Within the compass of this paper, it is not possible to give a full exposition of the inductive approach to the problem of the principles of international law.[20] The main lines of the argument, however, can be sketched. Every legal principle is an abstraction and generalisation from individual cases or legal rules of an apparently more limited scope. If this mental process is recognised for what it is, it is a helpful systematic and didactic technique.

The adequacy of any particular generalisation depends on whether it is made on its optimum level, that is to say, neither too high nor too low a level of abstraction. In any particular case, wide scope for agreement to disagree exists. In the field of international law, a comparison of most of the majority and minority opinions of the World Court will bear out this thesis. Thus, legal principles may be defined as abstractions or generalisations from rules which are the products of one or several law-creating processes. This technique can be applied on increasingly higher levels of abstraction and generalisation. Individual principles can be subsumed under the heading of still more general principles and so forth until, in the end, all such principles are brought under one or several still wider headings.

At any stage, the procedure can be put in reverse and, as if by a miracle, each of the principles and underlying rules can be deduced again from principles on a higher level of abstraction. Thus, the deductive method can be squared with the inductive

[19] See below, p. 250 *et seq.*

[20] For a fuller discussion of some of the more technical questions, including the problem of the circumstances in which a principle itself may become an overriding rule, cf. *loc. cit.* above, note 15, Chap. 1.

treatment of law, but merely as an auxiliary device for purposes of systematic and didactic convenience.

Whenever the deductive method is used, the magician's hat trick is applied. As we learn when we grow up, this mysterious gentleman is actually able to produce from his hat only as many rabbits as he had previously concealed in it. In another simile, legal principles are like the answers given by an electronic brain. It is able to give reliable answers only to the extent to which it has been fed with sufficient data. If not, the machine may still respond, but in this case the product is not legal principles from which true rules of law may be derived, but speculative and unverified hypotheses which, at best, may coincide with the reality of the law.

New Tasks of Inductive Analysis

Anxiety is sometimes expressed lest the changeover from deductive and eclectic methods to the inductive approach may involve two negative consequences. It is thought to deprive the doctrine of international law of its influence on the development of international law. Moreover, it is considered to reduce doctrine to the task of collecting and digesting the material of diplomatic and judicial practice. If either of these contentions were justified, self-limitation to the use of the inductive method would be largely equivalent to self-abdication and self-elimination of the doctrine of international law.

If the first argument means that representatives of Doctrine must renounce any pretension to play the law-maker in disguise, the objection is to the point. Nothing has brought the doctrine of international law into greater disrepute than proneness of individual representatives to present *desiderata de lege ferenda* in the guise of propositions *de lege lata*. Doctrinal attempts at surreptitious law-making in fields as varied as recognition, the individual as bearer of international rights and duties, or the continental shelf will bear out the imperative need for restraint and self-discipline in this respect. The disclaimer of any ambition of self-arrogation of quasi-legislative functions, however, is not synonymous with the self-exclusion of doctrine from influence on the further development of international law. In this field also, the doctrine of international law has its legitimate part to play.[1]

[1] See below, p. 259 *et seq.*

It would be no less calamitous if concentration on the inductive method were to mean that writers were condemned to limit themselves to the performance of tasks which may frequently be left to well-trained postgraduate students under the guidance of their seniors. The ideal solution has been found in the United States. Moore and Judge Hackworth, endowed with enviably large staffs and financial assistance, provided two invaluable *Digests of International Law,* and, on this basis, Hyde wrote his pioneering work on *International Law, chiefly as interpreted and applied by the United States.*

In the United Kingdom, the writer had the good fortune of being able to watch from close quarters Professor Smith's heroic one-man effort, in *Great Britain and the Law of Nations,* to roll into one, so to speak, Moore, Hackworth and Hyde. When it became clear that Professor Smith did not intend to complete his inspiring work, and the chances of a *British Digest of International Law* were as remote as ever, the writer set out on the same task as a token of gratitude for the niche which he had found in the academic life in this country and to maintain the tradition which, in the University of London, his teacher and friend had established. Since then, fortunately, the prospects of at least some of the raw material of British practice being collected in the way in which this ought to be done have considerably brightened. Thus, after all, it will be possible to lighten considerably Volumes 2 and 3 of the writer's *International Law* by cross-references to this, and other,[2] source material on British practice which is likely to be published in the years to come.[3]

It must necessarily remain with the compilers of any digest of State practice or those who direct their arduous labours to make their own selection from the abundant material. For reasons of public interest, or on still more pragmatic grounds, they may consider it advisable to limit themselves to a particular period. Taking for granted the adequacy of the quotations and illustrations chosen, it will still be left to independent scholarship to fill

[2] The announced publication of Lord McNair's *International Law Opinions* promises to be a major event in this field.

[3] This may also be an opportune moment to state that, in the course of further work in this field, the writer has been converted to the possibility of discarding the originally contemplated trichotomy and combining the analysis of British diplomatic and judicial practice in the two volumes reserved for *International Law in British Practice.*

in this picture from source material which has been omitted from such a compilation. Yet, however laborious, this is merely a minor aspect of the task which, then, still remains to be performed, that is to say, to analyse critically, systematise and evaluate such raw material in the light of the rules and principles of international law.[4]

If any such digest happened to be limited to international customary law, it would give a lop-sided picture of the practice of any State. This would then require to be supplemented by analysis and elaboration of the optional principles and standards of the treaty practice of the country concerned.[5] Similarly, the opinions of the law officers of any particular State are invaluable material for further analysis. Yet, in order to show whether, in any particular case, any individual opinion has remained a matter of *forum internum* or is actually an illustration of the practice of the State concerned, it is always necessary to go a step further and explore whether, and how far, such opinions have actually influenced governmental action on the international level.[6]

Thus, the first main task of analysis never ends. It consists in constant re-evaluation of the rules and principles of international law in the light of new material which some of the elements of the other law-determining agencies so generously provide.

Moreover, sufficient evidence is available to permit the formulation of a fair number of rules and the abstraction from them of seven fundamental principles of international law: the principles of sovereignty, recognition, consent, good faith, international responsibility, self-defence, and the freedom of the seas.[7] Necessarily, every such analysis and systematisation is always provisional and requires continuous adjustment on the basis of new material that comes to light. To judge by preliminary studies in this field, such new material appears to affect relatively little the primary rules which underlie each of the seven fundamental principles. They have been proved and tested in the

[4] See above, p. 243.
[5] For 'pilot' studies on British treaty practice, cf. (1945) 22 *B.Y.I.L.*, p. 96 *et seq.*, and (1948) 1 *Current Legal Problems*, p. 152 *et seq.*
[6] Cf. (1949) 26 *B.Y.I.L.*, p. 6 *et seq.*, at p. 7; (1951) 28 *ibid.*, p. 172 *et seq.*, and (1952) 6 *Y.B.W.A.*, p. 338.
[7] See further *loc. cit.* above, note 15.

course of an evolution which has extended over nearly a millennium.[8] Secondary rules which are the result of the interplay between the primary rules and between these primary rules and the three states of international law (peace, war and *status mixtus*)[9] are of greater instability. They require more frequent adaptation and reformulation.

Once the dimensions of even this one, and still largely unperformed, task are perceived, it should become self-evident that the inductive approach to international law is not likely to reduce the doctrine of international law either to a state of relative unemployment or uncritical subservience to international judicial or diplomatic practice.

Two other tasks go hand in hand with this primary task of analytical research. The 'self-hypnotism' of the doctrine of international law—to use one of the telling characterisations in Professor de Visscher's illuminating and courageous work on *Théories et Réalités en Droit International Public*—has too long prevented writers from realising that the history of international law is not primarily the history of its doctrine. Centuries before any of the putative fathers of international law were born, international law was a living reality. 'Pilot' studies on the practice of the medieval city States of Italy[10] and early English practice[11] furnish plenty of evidence of the permanency and stability of the primary rules which govern the fundamental principles of international law. Yet the early practice of most medieval States remains still unexplored. Similarly, the task of tracing the origin and evolution of individual secondary rules out of a rich treaty practice, and their transformation into *jus æquum* within the folds of international customary law, still lies ahead.[12]

The third task is the systematic study of treaty practice. Its purpose does not exhaust itself in supplementing the picture of the practice of individual States.[13] If treaties are grouped from

[8] See below, p. 257.
The postponement of Vols. 2 and 3 of *International Law* has set the writer free to attempt the formulation of these rules in primary reliance on international judicial and British practice in a treatise which, in due course, will be published by Messrs. Stevens under the title *International Law in Perspective*.

[9] See further (1943) 37 *A.J.I.L.*, p. 460 *et seq.*

[10] Sereni, *The Italian Conception of International Law*, 1943.

[11] (1945) 22 *B.Y.I.L.*, p. 97 *et seq.*, and (1948) 25 *ibid.*, p. 52 *et seq.*

[12] For some concrete suggestions of suitable topics for research in this field, cf. *loc. cit.* above, note 15.

[13] See above, p. 245.

a functional point of view, whole new special branches of international law emerge. On the foundations of the seven basic principles of international law, State practice has erected superstructures of uneven significance.

The more important of these share a number of features. In the main, the legal principles in these fields are optional in the sense that their binding character depends on consent. In order to give concrete meaning to these principles and to adapt them to individual requirements, State practice in each of these spheres has developed a number of subsidiary principles, which may be termed standards.[14] These superstructures attain a remarkable degree of stability because, by and large, they rest on the most reliable of the three working principles behind international law, that is to say, that of reciprocity.[15] Finally, since the nineteenth century, they have been increasingly strengthened by their association with international institutions which are concerned with the furtherance of such activities.

It must suffice to provide a single illustration from one of these special branches. A number of optional principles can be abstracted from the treaty practice in the field of international economic law. One of the most ancient and central is that of freedom of commerce. In order to achieve this object, the practice of States has developed seven classical standards, chief among these being the standards of national and most-favoured nation treatment.[16] Perhaps still more instructive is the minimum standard of international law,[17] for it outgrew both its optional character and the limits of international economic law. While originally conceived as a gradually stereotyped series of treaty clauses in the interest of foreign merchants, in the course of the nineteenth century this standard came to form part of the *jus æquum* of international customary law and its benefits were extended to foreigners at large.[18]

In addition to International Economic Law, it is now possible to point to other emerging branches of international law, such as

[14] See further (1948) 2 *I.L.Q.*, p. 402 *et seq.*

[15] See below, p. 250 *et seq.*

[16] See further (1945) 22 *B.Y.I.L.*, p. 96 *et seq.*, and *loc. cit.* above, note 14.

[17] See further *loc. cit.* above, p. 238, note 8, Chap. 12.

[18] See further (1948) 1 *Current Legal Problems*, p. 152 *et seq.*, and (1952) 5 *ibid.*, p. 295 *et seq.*

the Law of International Institutions,[19] International Labour Law,[20] or International and Comparative Air Law.[1]

By way of a by-product, the functional study of international treaty practice serves another, and by no means insignificant, purpose. In this way, it becomes possible to gauge accurately at any time the degree of integration which world society and any of its segments have attained.

In concluding this section, it is perhaps useful to refer briefly to another view which has been voiced: that we are inductive lawyers all. This appears an over-simplification of the real issue. It may, therefore, be advisable to formulate the distinctive features of the inductive approach to international law—

(1) Emphasis on the exclusive character of the three law-creating processes of international law. This excludes, for instance, natural law as such as an admissible law-creating process. It does not, however, mean denying its formative influence as one of the many social factors which have assisted in shaping international law.[2]

(2) Assessment of the position of courts and the doctrine of international law as subsidiary law-determining agencies and determination of the place of each element of any of these agencies in accordance with intrinsic, but rationally verifiable tests.

(3) Awareness of the character of the rules of international law as the only binding norms of international law unless evidence is forthcoming that a principle which has been abstracted from such rules, has itself acquired the character of an overriding rule. This implies that principles on any level of abstraction or terms of classification as such cannot be 'sources' of rules, and that deduction is strictly limited to its auxiliary place as a systematic and teaching device.

Finally, it may be stated again that the inductive method does not claim to be able to exclude all traces of subjectivity. A minimum of subjectivity is inseparable from any process which calls

[19] See further *loc. cit.* above, p. 238, note 8, Part 7.
[20] *ibid.*, Chap. 14.
[1] For postgraduate syllabuses of the University of London in two of these special branches, *i.e.*, International Economic Law and the Law of International Institutions, cf. (1951) 4 *I.L.Q.*, pp. 305–306.
[2] See below, p. 250 *et seq.*

for selection, criticism and evaluation. It is not, however, rationally controlled and challengeable subjectivity which constitutes the danger. It is unverifiable subjectivity which poses as objectivity incarnate. At one time or another, any of the elements of the various law-determining agencies is liable to fall victim to the temptation of overstepping the border line between *lex lata* and *lex ferenda*. It is not one of the least services which the inductive method can render to act as an element of automatic self-control against any such usurpation of legislative functions.[3]

II—TASKS OF SYNOPSIS

In the introductory section of this paper, two questions were raised, but left unanswered. The one was why, with such clockwork regularity, doctrine should raise such high hopes for the development of international law only, in due course, always to disappoint.[4] The other was how to determine the place of the doctrine of international law in the wider field of international studies.[5]

The Need for Inter-Disciplinary Studies

The predominant view among international lawyers still appears to be in favour of the self-isolation of the legal element from the contamination which contact with non-legal aspects of international relations is supposed to involve.[6] On the most charitable interpretation, the attitude of the ivory-tower school rests on self-delusion.

Even for purposes of purely analytical work, it is frequently unavoidable to venture outside the charmed castle of purely analytical studies. Thus, if an analytical lawyer were asked to explain the meaning of the general principles of law recognised by civilised nations, how can he inform us of the component elements of this law-creating process without finding out first what civilised nations are?[7] How can doctrine cope with the cataclysmic evaluation of recent developments in international law,

[3] See below, p. 259 *et seq.*
[4] See above, p. 235.
[5] *Ibid.*, p. 236.
[6] Works of writers such as Professors McDougall, Stone and de Visscher are encouraging signs that the hold of this school of thought on the doctrine of international law is becoming somewhat precarious.
[7] See further (1955) 8 *Current Legal Problems*, p. 212 *et seq.*

which may be found in a long series of Judge Alvarez's separate opinions,[8] without meeting him on his own ground? How is it possible, with any confidence and on a rationally verifiable basis, to make the selection between private law institutions which are suitable for incorporation into international law and those which are not,[9] without applying tests which cannot rest exclusively on analytical findings, but presuppose the existence of other working hypotheses? Or, how is it possible to deal fairly with highly debatable propositions on the 'basic philosophy' of a multilateral treaty such as the Charter of the United Nations or necessarily subjective views on the 'highest international interest'[10] without responding to such challenges on congenial planes?

Actually, doctrinal writings of the analytical school abound with purely subjective statements. Frequently, such subjective major premises remain inarticulate. Sometimes, they take the form of outworn *clichés,* such as *inter pacem ac bellum nihil est medium*[11] or of so-called logical postulates of international law, like *voluntas civitatis maximæ est servanda.*[12] Refusal to accept the existence of scientific tests for the verification of the validity of such assumptions hardly assists in preserving the purity of legal research. It means arrogation of the privilege to indulge without risk of criticism in unrestrained subjectivity.

At any time, scientifically uncontrolled assumptions and propositions are a deficiency of scholarship. If related fields of studies are in an amorphous state, mitigating circumstances for such failings may be pleaded. Since the inter-war period, however, work in the fields of international history and relations[13] has sufficiently moved forward to permit thinking in terms of the unity of international studies. Such unity is not one of indis-

[8] See further (1951) 4 *ibid.*, p. 5 *et seq.*

[9] Cf. Judge McNair's Separate Opinion on 'International Status of South-West Africa,' *I.C.J. Reports, 1950,* p. 148.

[10] Judge Lauterpacht's Individual Opinion on 'South-West Africa—Voting Procedure,' *I.C.J. Reports, 1955,* pp. 108 and 122.

[11] See further *loc. cit.* above, p. 247, note 9.

In his own studies, the writer has found that practically all unquestioned assumptions and *clichés* in the field of international law are faulty. Frequently, the most illuminating working hypothesis which, subsequently, may require modification in the light of further research, is to turn such assumptions and *clichés* upside down. Their very opposite is often nearer to the reality of the matter than their purported message.

[12] See further (1952) 6 *Y.B.W.A.*, p. 258 *et seq.*

[13] See further the writer's 'Power Politics,' *A Study of International Society,* 1951, p. 3 *et seq.*

criminate imperialism on the part of scholars in any of these fields, but an inter-disciplinary unity.

Rightly, international lawyers have refused to concede to historians the right to a monopoly in the history of international law. The best among the lawyer-historians, however, always realised[14] that if their work was to comply with the highest standards of technical competence, they had to borrow the necessary equipment from those who were more familiar than they with handling historical material. Whenever the full understanding of problems of international law calls for the application of other, and to the analytical lawyer primarily alien, techniques, be they historical, sociological or philosophical, the international lawyer requires neither an *exeat* from any master nor an entrance permit into such border lands.

Before venturing on any such journey outside accustomed folds, a sceptical analytical lawyer may inquire whether it is really necessary. Yet not even he can avoid tackling issues such as the peculiarities and weaknesses of international law. Without attempting to comprehend the social functions of law in general,[15] and international law in particular,[16] it is impossible to cope with any of these basic issues.[17] Then, the next steps are predetermined. Any material or method which assists in obtaining more acute awareness of the real structure of international society and the main driving forces in this turbulent environment will prove handy. Experience has shown that the History and Sociology of International Law provide the missing link between international law and relations. This vital position warrants their recognition as special branches of international law.

Additional, and weighty, reasons why these disciplines call for the urgent attention of international lawyers are not lacking. Even the most discreet collection of assessments made by distinguished international lawyers of the significance of more recent superstructures of international law, such as the League of

[14] Cf. *loc. cit.* above, note 12, pp. 253–254.
[15] See further (1949) 2 *Current Legal Problems,* p. 103 *et seq.*
[16] See further *loc. cit.* above, note 13, p. 202 *et seq.*
[17] It might appear discourteous if, in this context, Dr. Lauterpacht's (as he then was) *Function of Law in the International Community,* 1933, were not mentioned. The actual contents of this incisive work are, however, more accurately described in its original title, as announced shortly before publication: *Law and the Judicial Function in the International Community.* Cf. *Annual Digest, 1919–1922,* 1932, p. 177, n. 1, and *op. cit.,* 1933, p. ix.

Nations, the Treaties of Locarno, the United Nations and other contemporary international institutions, universal instruments on the protection of human rights, the Charters of the Nuremberg and Tokyo Tribunals or the Genocide Convention would make pathetic reading to any trained student of international relations.

Actually, international lawyers have no choice; they cannot refrain from qualitative evaluations. Otherwise, they deprive themselves of even the possibility of assessing the relative significance of changes which take place in their very own field. Thus, in the abstract, it appears self-evident that the other alternative must be chosen. International lawyers must be prepared to adopt whatever techniques may be required to cope adequately with issues of this kind.[18]

Obstacles and Difficulties

The pragmatic obstacles to taking such a straightforward course should not be underestimated and, even in countries in which the liberal tradition is still a living reality, the price of availing oneself of this privilege of academic freedom may be considerable. The explanation of this apparent paradox will cause little difficulty to anybody who is acquainted with sociology, if only at its most elementary stage. In pursuing problems of the sociological interpretation of international law, search for truth comes easily into conflict with its most exasperating enemy: vested interest, and, worse still, imaginary vested interest. Then, otherwise open and benevolent minds simply become closed and obtuse to rational argument. What is in danger of being exposed is what they are resolved to keep hidden at any price, even that of jeopardising academic freedom.

Their objection is not to any method because it is not in keeping with tradition. At the most, this is a pretence which deceives nobody and is not meant to deceive anybody. Arguments in this class are but polite injunctions to keep away from subjects which are declared taboo. The real arguments are of a different kind. They belong to the category of *lex est voluntas,* the appropriate antithesis to *lex est veritas.* To follow up this trend of thought would involve writing a separate paper on *The Psychology and Sociology of the Doctrine of International Law.* Nobody would be better qualified than Professor Charles de

[18] See further *loc. cit.* above, note 13, pp. 232 *et seq.* and 261 *et seq.*

Visscher to write it. The hope that one day he will perform this congenial task may serve as justification for turning to another aspect of this subject. Why should the sociological approach to international law be forbidden ground?

The reasons are not far to seek. So much of international relations is bound up with power. Those who have it have a tendency to disguise it, and those who stand in fear of moving down in the hierarchy of power or are passively engaged in this process easily fall victim to the illusion that if only the reality of the situation remained unexplored, they would have a fair chance, at least for the time being, to continue to be treated as if nothing had happened. At the utmost, one type of sociological research only is compatible with this policy of the ostrich, that is to say, the obliging variety which over-complicates the simplest position by an incomprehensible terminology and puts endearing emphasis on the fact that not *all* international relations are based on power. Yet any analysis which takes the obvious for granted, but insists on calling a spade a spade and ventures to maintain that the *decisive* relations between powers on a footing of society relations are regulated by power[19] becomes anathema.[20]

It would be unfair to imply that the actual or imagined vested interests involved were only so-called national interests as interpreted by their self-appointed guardians.[1] In systems of power politics pure and simple and power politics in disguise, the functions of international law are necessarily limited,[2] and the overall relations between the two halves of a divided world are still regulated by the law of power rather than the rule of law.[3] In spite of the glaring obviousness of this situation, the 'cause' of international law itself is treated as another vested interest of its

[19] See above, p. 252, *loc. cit.* in notes 15 and 16.

[20] For an illuminating analysis of this phenomenon, cf. Professor Morgenthau's stirring 'Reflections on the State of Political Science' (1955), 17 *Review of Politics,* p. 445 *et seq.* Cf. also J. Bronowski, *The Dilemma of the Scientist,* 1955, pp. 5–6.

[1] Even at a time when this type of vested interest was much less strongly entrenched than at present, lawyers of the stature of Amos, Fauchille, Oppenheim and Professor Pound thought it necessary to draw attention to this issue, nor were they prepared to concede that it was 'unsuited' for public discussion. Cf. also the stricture of the 'frequently politically inspired' character of doctrinal writings in Judge Huber's Report in the *Spanish Zone of Morocco Claims* (1924), 2 R.I.A.A., p. 640.

[2] See further *loc. cit.* above, note 13, pp. 232 *et seq.* and 261 *et seq.*

[3] See further (1950) 36 *Grotius Transactions,* p. 229 *et seq.*

own. It is supposed to be endangered by any detached dissection of reality and spurious ideologies which serve to divert attention from the more disquietening aspects of international relations.

Who is the addressee of these techniques of the blind eye? It can hardly be supposed to be any other power. The practically instantaneous reaction of Japanese foreign policy to the weakening of British naval strength in the Pacific in the pre-1939 era [4] is one of many proofs to the contrary which come to mind. If this is true on the level of international relations, is it likely to be different on that of international law? The general public has long ceased to be interested in the self-delusions of international lawyers who have suggested one one-way path to peace after another. If international law were a cause, and not an object of sympathetic, but necessarily detached study, no greater disservice could be rendered to it than by the advocacy of short cuts to world order which are predestined to failure and whose only objective function is to be abused for ideological purposes.

Admittedly, such ideologies are considered a necessary adjunct to the armoury of most states in the nexus of power politics in disguise. Intellectuals are required to produce such armament for use in times of peace as well as those of cold and hot war. In an all-engulfing system of world power politics in disguise, this need puts democratic governments in a dilemma. Unlike their authoritarian or totalitarian counterparts,[5] their civil services cannot easily commandeer ideologies to order from scholars with a reputation to lose.

In the apt terminology of group psychology, they prefer to rely on the automatic response from animate servo-mechanisms. The more international lawyers remain blissfully ignorant of the realities of international life, the less likely are they to become

[4] Cf. Vols. 8 and 9 (Third Series) of *Documents on British Foreign Policy 1919–1939*, 1955.

If evidence were needed that awareness of the reality of international relations does not impair the specific qualities which are rightly demanded from the international lawyer nor call for his self-isolation from non-legal aspects of world affairs, it would be provided by the penetrating Memorandum written by Mr. G. G. Fitzmaurice, as he then was, *respecting the Proposal to station a British Battle Squadron permanently at Singapore* (January 27, 1939—*ibid.*, Vol. 8, p. 543 *et seq.*).

[5] Cf. Hazard, *Law and Social Change in the U.S.S.R.*, 1953, p. 274 *et seq.*, and Lapenna, *Conceptions Soviétiques de Droit International Public*, 1954, and, on the doctrine of international law in the Third *Reich*, the writer's *International Law and Totalitarian Lawlessness*, 1943, p. 13 *et seq.*

self-conscious of the functions which, in this context, they unknowingly fulfil. Frail as, of necessity, such ideologically tainted aspects of their work must be, they require protection and immunity from criticism.

From this point of view, the irritating effect of emphasis on the inter-disciplinary unity of international studies and the sociological interpretation of international law cannot be denied. It should also be squarely conceded that the adversaries of such approaches to international law have a cause at heart. It is, however, hardly that of international law.

This dilemma of democracy is not only an abstract one. It is necessarily also a personal problem. The writer shares with those who, on this point, differ from him, the ultimate values for which they stand. If, nevertheless, he considers it his duty to disturb the surface quiet on this topic, the reasons for such an act of non-conformism must be laid bare.

In fighting their enemies in peace and war, democracies cannot entirely help being conditioned by the law of the lowest denominator, that is to say, in society relations behaviour tends always to be prescribed by the most unprincipled and unscrupulous. Yet, by descending to this level, democracies are in constant danger of becoming increasingly like the enemy against whom they try to preserve their own way of life.

Search for truth and freedom of research stand high in the liberal-democratic order of values. If they are called in question, it is the duty of the academic teacher to break discreet silence. In taking this line, he stands up for the values on which, ultimately, this very way of life rests. Short-term advantages which are supposed to be gained from yet undebunked ideologies are not worth the price, for intellectual corruption is not only the lot of those who participate actively in such ventures, but also taints those who know better, but remain silent. The other reason is that of personal responsibility. It would not be fair to encourage younger colleagues and postgraduate students to undertake work of this kind without warning them clearly of the difficulties which, in this way, they may create for themselves.

The Value of Inter-Disciplinary Studies

In every field of scholarship, the problem arises how to provide an accurate and rationally verifiable picture of the sub-

ject as a whole, and its most significant features, in a proper perspective. Without such a total view, even the most brilliant brain and the most highly trained technician is not unlike a babe in the woods. Inter-disciplinary studies, which are closely related to international law, can show to the international lawyer his own field in at least three complementary perspectives.

The History of International Law provides him with inductively verifiable initial hypotheses which are less remote from reality than so-called logical hypotheses of international law.[6] It can furnish him with an insight into the evolution over more than nine hundred years of the fundamental principles of international law which will allow him to assess fairly accurately the place of more recent additions to, and modifications of, this basic structure. Finally, it is possible to formulate historical working hypotheses[7] which should be of assistance to newcomers in their own research work. The more work is done in this virgin field, the more such working principles are likely to change from provisional hypotheses into firmly established findings of historical research.

The Sociology of International Law is able to supplement the historical perspective by one of its own with the emphasis on the scope and limit of the functional frontiers of international law.[8] At any time, so peculiar a legal system as international law can be understood fully only in relation to its social background. At no time, however, is such guidance as may be derived from sociological working hypotheses[9] more urgently needed than now that our generation has entered the new age of nuclear power.

International relations in the nuclear age are full of apparently bewildering contradictions. The world is spanned by a near-universal confederation of States. Within the 'United' Nations, two world camps face each other in a state of semi-permanent tension. The only constant element in these relations is their uneasy character which is permeated by attitudes of profound mutual distrust. Simultaneously, the number of specialised international agencies has increased at an encouraging, though

[6] See further *loc. cit.* above, note 12.
[7] Limitations of space prevent the presentation of these working hypotheses in this paper. In due course, readers will find them fully set out in *International Law in Perspective* (see above, p. 247, note 8).
[8] See further, *loc. cit.* above, note 13, p. 202 *et seq.*
[9] See above, note 7.

inflationary, rate. Independence is thought to be increasingly replaced by interdependence. The North Atlantic Pact and its offshoots, on the one hand, and its counterpart, the Pact of Warsaw, on the other, are hailed as examples of international integration. The European Coal and Steel Community is held out as an illustration of supra-national institutions and the forerunner of things to come. Thus, has sovereignty come to be a notion of the past, or is it only the sovereignty of all but the super-powers of our age that is on the wane? Neutrality is held to be another relic of the past. Yet, a growing number of nations have no dearer wish than to be allowed to contract out of world politics. Human rights have hardly ever been more vociferously proclaimed and hardly ever been more shamefully disregarded in wide parts of the world. How is the international lawyer to find his way through this bewildering labyrinth without commensurate guidance? The academic disciplines of International Relations and the Sociology of International Law are able to provide him with the requisite thread of Ariadne.[10]

Yet, even if equipped with historical and sociological perspectives of international law, most international lawyers are likely to be still in search of something which, somehow, appears to be missing, and which these pictures cannot give them: a normative perspective, in the light of which, at any time, they are able to evaluate international law in accordance with a hierarchy of moral values.

For some, their own faith will provide the necessary answer. On this metaphysical level, discussion is possible only among those who are already agreed on fundamentals. Those who are on the lookout for an ethical perspective which is likely to provide a more widely accepted common denominator and is inductively verifiable, may find the key in the phenomenon of civilisation.[11] They may, then, be left to judge for themselves what contribution present-day international law can make to prevent our age of co-existence in fear of co-extermination from relapsing into a state of mechanised barbarism.

These few glimpses of the potentialities of the inter-disciplinary study of international law are all that it is possible to offer within the compass of this paper. The views of inter-

[10] See further *loc. cit.* above, note 13, p. 261 *et seq.*
[11] See further *loc. cit.* above, p. 250, note 7.

national law in perspective provide the synopsis which is the indispensable counterpart to unavoidable specialisation in the analytical field. To ask anybody to forego these guides would be more than an affront to the dignity of scholarship and personal self-respect. It would amount to a piratical attempt to deprive the good ship *Jus Gentium* of her compass in stormy seas.

III—CONSTRUCTIVE TASKS

In its analytical work, doctrine must try its hardest not to blur the border lines between *lex lata* and *lex ferenda*. The reason for this need is exactly the opposite to what may be imagined. It is not that, in any concrete case, the dividing line is likely to be clear beyond the shadow of doubt.[12] The very relativity of this distinction commands such self-restraint.

On the level of international law in unorganised international society, contention stands against contention without means of any binding solution short of the conclusion of a treaty. Even so, the interpretation of any such treaty may lead to further disagreement which, in the absence of renewed resort to the device of consent, must again remain unresolved. In this embryonic state of international integration, doctrine alone can provide such authoritative answer as may be found. Thus, the necessary antidote to a state of maximum subjectivity in diplomatic practice is the maximum of objectivity in the doctrine of international law. This is not to imply that, even on this level, international law is static. It develops by way of consent, recognition and acquiescence. If sufficient evidence for any change in the law exists it must be registered. If it is lacking, doctrine must resist the temptation to formulate desirable developments of international law as if they were existing rules of international law.

On the level of partly organised international society, the position is different. International courts and tribunals may derive from a *compromis* or declarations by States under Article 36 of the Statute of the World Court authority to proceed more boldly. The exercise of wider judicial discretion than doctrine would claim may rest on the overriding intention of parties to a dispute to have it finally settled. In order to achieve such a definitive solution, an international judicial institution

[12] Cf. McDougal and Schlei (1955) 64 *Yale Law Journal*, p. 655 *et seq.*

may have to stretch the law and, then, consider itself entitled to invoke 'well-known' rules[13] which may, or may not, form part of existing international law.[14] Moreover, the nature of the international judicial process itself may have its impact on actual rules of international law and lead to their modification, for instance, by way of estoppel.[15]

Even so, the law-making power of judicial international institutions is severely limited. Parties to contentious cases are bound by the principle of *res judicata*. Others, however, remain free to judge for themselves whether they wish to accept any such development of the law as an accurate interpretation of existing international law.[16] Although manifold reasons may be adduced why States are shy of submitting their disputes to international adjudication, an impressive number of cases pending before the World Court would be positive evidence of the confidence inspired by it as a living repository of *lex lata*.[17]

Does compliance with such admittedly severe self-denying ordinances mean that doctrine has no guidance to offer on the further development of international law? The answer must be an emphatic affirmation of the right and duty of doctrine to make its own contribution to the task of international planning.[18]

Scope and Limits of Legal Planning

At this point, the Sociology of International Law has its constructive part to play. The functional interpretation of international law leads to the conclusion that, for centuries, international law has been condemned to the subordinate place of a weak society law. This apparently discouraging analysis has its positive implications.

Individuals and groups are not forced to arrange their relations on this uncomfortable basis. At any time, they remain free agents to transform any such social nexus into one on the footing of community relations.

[13] Cf., for instance, the *Mosul Case* (1925), B. 12, p. 32.
[14] Cf. Judge Klaestaed's Sep. Opin. in 'South-West Africa—Voting Procedure,' *I.C.J. Reports, 1955,* pp. 85–86, and see further *loc. cit.* above, p. 238, note 8, Vol. 1, Chap. 47.
[15] See further *loc. cit.* above, p. 241, note 15.
[16] See above, p. 238.
[17] For a valuable statistical analysis of the work of the World Court, cf. Rosenne (1955) 9 *International Organisation,* p. 244 *et seq.*
[18] See further *loc. cit* above, p. 251, note 12, p. 265 *et seq.*, and p. 251, note 13, p. 727 *et seq.*

Admittedly, what, at any time, is feasible, depends on a number of factors. At this point, the sociologically trained international lawyer can be of assistance. He should be able to point out the decisive factors which determine the limits of the functional frontiers of international law, beyond which international legislators may stray only at their peril.

These factors may be called field-determining agencies. They are so important that they deserve particular attention from a separate branch of international law which may be termed the Science of International Legislation. Three of these agencies are of first-rate significance: the degree of integration of world society or any of its segments, the measure of structural uniformity of States and the value of their ethical common denominator.[19] Reference to these field-determining agencies can serve three purposes.

In combination with the working principles behind international law,[20] the field-determining agencies provide a reliable means of assessing the prospects for new branches in the analytical field.[1] Thus, it does not require profound study to realise why subjects such as the Law of International Institutions, International Economic Law or International and Comparative Air Law are bound to have a promising future. By way of contrast, the horoscope for International Criminal Law as a life subject is necessarily more subdued.[2]

Moreover, these agencies assist in a rationally controlled and detached assessment of far-reaching proposals for, *e.g.*, the reform of the United Nations, universal covenants of human rights, the international control of nuclear energy, and the like.[3] Thus applied, the field-determining agencies become handy tools in performing the critical tasks of the Science of International Legislation in the field of international planning.

Finally, these agencies serve to make sure that, at any time, particular projects exhaust existing functional potentialities to the full, and that such efforts do not fail to reach the utmost point of the functional frontiers of international law through uncalled

19 See further *loc. cit.* above, p. 251, note 12, p. 266 *et seq.*
20 See further *loc. cit.* above, p. 251, note 13, p. 202 *et seq.*
1 See above, p. 248.
2 See further (1950) 3 *Current Legal Problems*, p. 263 *et seq.*
3 See further *loc. cit.* above, p. 251, note 12, p. 265 *et seq.*, and p. 251, note 13, p. 727 *et seq.*

for timidity. In this respect the international integration of the free world appears still to fall considerably short of its present-day opportunities.[4]

Patterns of International Planning

If, without availing themselves of inter-disciplinary assistance, international lawyers embark on proposals *de lege ferenda,* they appear to conform with one or two patterns. They tend to emphasise that their proposals are entirely unpolitical and inspired only by a desire to serve international law.

For instance, would it not be in the true interest of international law to induce States to accept the compulsory jurisdiction of the World Court for the settlement of any international dispute? In support of this view, it is argued—and it appears, rightly—that no objective criterion exists to justify any distinction between political and legal, or non-justiciable and justiciable, disputes. From this thesis the brilliant conclusion is drawn that, potentially, all political disputes are legal disputes. Subject to a minor qualification this proposition is correct.

The relativity of the distinction between political and legal disputes is a two-way traffic. It would be equally true to hold that, potentially, all legal disputes are political disputes. Both propositions are equally tenable, for law is only one of several standards of international conduct of which States may avail themselves. Preference for the settlement of disputes on the basis of international law is hardly a proposition of a purely or predominantly technical nature. It is a suggestion which is based on a number of hidden value judgments. If these were elaborated, it would be found that a whole inarticulate system of international ethics underlies such a seemingly technical proposal.

The other pattern is that of actual or apparent disregard of the realities of international life. Thus, international lawyers have freely advocated proposals for the limitation, or abolition, of the veto in the Security Council of the United Nations.

In a relatively homogeneous world of friendly powers, such a proposition would certainly constitute a considerable improvement in existing world organisation. Even on this assumption, the main powers made it painfully clear at the Conference of San Francisco that they were not prepared to join the United

[4] See further *loc. cit.* above, p. 251, note 13, p. 804 *et seq.*

Nations without the right of veto. Since then our world has become much more bitterly divided. In a state of semi-permanent cold war, to ask powers which, in the foreseeable future, are likely to remain in a minority in the Security Council to consent to any reduction in their veto power would mean to demand from them very much more than from any world power which belongs to the majority group.

The 'pure' lawyer will be ready with his answer. In accordance with the 'basic philosophy' of the Charter, and the principles 'enshrined' in it, the Security Council ought to be envisaged as a quasi-judicial body, in which more or less predestined majorities or minorities ought not to exist. Therefore, they must be deemed not to exist.

Assuming that such an argument were to be expected only on the level of incipient inter-disciplinary training, a teacher in despair would probably refer the novice to a straightforward Grammar of Power Politics in Disguise,[5] designed to be of assistance on such an elementary level of insight and perception.

The next stage in the proceedings would probably be an essay on lines such as these: 'Assuming that the Security Council were dominated by the Soviet Union and Red China, on what grounds, if any, would you advise the Governments of the United States and the United Kingdom to limit or renounce their right of veto under the Charter?'

At this point the student may surprise his teacher and inform him that the assumption on which the question was based was far-fetched, that nobody expected such a proposal to be acceptable to any of the world powers, but that, nonetheless, such a scheme for the reform of the Charter had its tactically good points; for it would force the minority into the position of having to reject the proposal and incur the opprobrium of world public opinion. Then, it would become the teacher's turn to learn that proposals for the reform or development of international law which are unrealistic are not necessarily the products of purist minds, but also may be inspired by ideological *arrière-pensées*.

The Science of International Legislation cannot have any truck with either unworldly naïvety or purposeful half-blindness. On the contrary, one of its chief tasks consists in making articulate

[5] *loc. cit.* above, p. 251, note 13, p. 716 *et seq.*

the value-judgments which lie behind any proposals for the development of international law.

It will, then, be found that most of these schemes can be reduced to relatively few patterns.[6] Some of these plans, such as proposals for compulsory international adjudication of international disputes, the international protection of human rights or the international control of nuclear energy are typical of the one-way pattern.[7] On the surface they appear to require merely a change in one specific direction. In fact, however, they postulate in that particular field the creation of a World State. Others are less subtle, or more honest, and make this object their avowed aim.[8]

It is not for the Science of International Legislation to gainsay any of these blueprints. The decision for, or against, the continuance of the existing system of world power politics in disguise is a matter of politics. The international lawyer's function is more humble. If asked for counsel, his task is to give guidance and to explain the price and sacrifices at which any of these utopias of today can be transformed into realities of tomorrow. At the same time, insistence on such a detached and relativist attitude enables the international lawyer to preserve his professional independence, objectivity and integrity.

CONCLUSIONS

The picture which, it is hoped, has emerged from this discourse is one of a harmonious balance between the various tasks of the international lawyer in our time. The growing number of new analytical tasks which wait to be accomplished makes specialisation in this field unavoidable. The inevitable evils of specialisation, however, are counteracted by an inter-disciplinary approach. It provides a synopsis of international law in three essential and complementary perspectives. Similarly, vigorous emphasis on the need for conscientious observance of the border line between *lex lata* and *lex ferenda* in analytical work is balanced by offering

[6] For an application of this technique to proposals for the revision of the Charter, cf. the Report of the Rapporteur of the Committee on the Review of the Charter of the United Nations to the Edinburgh Conference of the I.L.A., 1954, *Conference Report*, p. 104 *et seq.*

[7] See further *loc. cit.* above, p. 251, note 13, p. 733 *et seq.*

[8] *Ibid.*, p. 767 *et seq.*

liberal scope to constructive inclinations in the sphere of international planning.

Yet, harmony is not an end in itself. At the most, it is an æsthetically pleasing by-product of aiming at the overriding object of our search. This must be to redraw the frontiers of the province of doctrine in such a way as to enable it to make the fullest contribution to the study and development of international law in the nuclear age.

TABLE OF CASES

Adler *v.* Dickson & Wallis ... 233
Air France *v.* Nordisk Transport 230, 231
American Smelting *v.* Philippine Airlines 224
Andre *v.* J. H. Vantol 114
Andrews *v.* Singer ... 114, 115, 116
Anglo-Norwegian Fisheries Case 209
Ardath Tobacco *v.* Ocker 129
Armstrong, Whitworth *v.* Redford 107
Astor, Re 41
Asylum Case 210
Attias *v.* Régie Air Afrique ... 222
Att.-Gen. *v.* Edison Telephone 105
Att.-Gen. of Australia *v.* Adelaide Steamship 6

Bagettes *v.* G.P. Estates 138
Baldry *v.* Marshall 114, 118
Bank Melli Iran *v.* Barclays Bank 126
Benaim *v.* Debono 126
Berg *v.* Landauer 115
Bishopsgate Motor Finance *v.* Transport Brakes 127, 128
Brandt *v.* Morris 124
Bristol Tramways *v.* Fiat Motors 117
Browning *v.* Watson 73
Budberg *v.* Jerwood & Ward 119
Burstall *v.* Grimsdale 123

Cahn *v.* Pocketts 126
Calcutta and Burmah *v.* De Mattos 114
Callow *v.* Tillstone 72
Caney *v.* Leith 25
Carter *v.* Mace 63
Central Meat Products *v.* McDaniel 114
Champanac *v.* Waller 115
Chesters, Re 50
Chung Chi Cheung *v.* The King 209
Clayton *v.* Le Roy 130
Clemens Horst *v.* Biddell Bros. 123, 125
Clifford, Re 42
Closure of the Port of Buenos Aires Case 241
Coates, Re 53
Cointat *v.* Myham 114
Cole *v.* North Western Bank 119
Colin & Shields *v.* Weddel 123
Colley *v.* Overseas Exporters 124
Comptoir d'Achat du Boerenbond *v.* Luis de Ridder 123
Connors *v.* Connors 6
Crane *v.* London Dock 128
Craxfords (Ramsgate) *v.* Williams & Steer 113
Cunningham *v.* Robert A. Monro 124
Curtis *v.* Chemical Cleaning ... 27

Daly *v.* Cannon 98
Davies, Turner *v.* Brodie ... 63, 72
De Gorter *v.* Attenborough ... 121
Delaney *v.* Wallis 128
Diamond Alkali Export *v.* Bourgeois 123
Diploma Laundry *v.* Surrey Timber 138
Douglas, Re 42
Drummond, Re 40
Duff *v.* Kelantan 3
Du Jardin *v.* Beadman Bros. 120
Duncan *v.* Cammell Laird 4
Dunne *v.* Byrne 48
Dupree, Re 45

Eastern Greenland Case 210
Engelke *v.* Musmann 3
English *v.* Western 115
Etablissements Chainbaux *v.* Harbormaster 126

Farley *v.* Westminster Bank ... 48
Finska Cellulosaforeningen *v.* Westfield Paper 123
Foakes, Re 50
Folkes *v.* King 120
Foreman & Ellams *v.* Blackburn 123
Francis Jackson Developments *v.* Hall 97
Froman *v.* Pan American Airways 232

Ganley *v.* Ledwidge 128
Gardner *v.* Akeroyd 69
Gestetner, Re 53
Glasgow Corporation *v.* Central Land Board 4
Glyn *v.* Western Feature Film 81

Goepp *v.* American Overseas Airlines 232
Good, Re 44
Goodman *v.* Mayor of Saltash 49
Gott *v.* Nairne 41
Grade *v.* D.P.P. 63, 70
Gray, Re 44
Green *v.* Burnett 58, 60, 61, 67, 68, 71
Greenwood *v.* Backhouse 71
Grenfell *v.* Meyerowitz ... 113, 118
Grey *v.* American Airlines 224, 232
Griffiths *v.* Studebakers 66
Groom *v.* Barber 125

Hadden, Re 50
Hagar Revelly Case 79
Hardy *v.* Hillerns & Fowler ... 126
Hardy *v.* Pound 124
Hargreave *v.* Spink ... 128, 129, 130
Harris *v.* Plymouth Varnish ... 118
Hennessy *v.* Air France 231
Heyman *v.* Flewker 118, 119
Hickman *v.* Roberts 25
Hightrees Case 24, 26
Hill *v.* Minister of Pensions ... 110
Hill *v.* Smith 129
Hogan *v.* Byrne 39
Holland Colombo Trading Society *v.* Segu Alawdeen ... 123
Honck *v.* Muller 114
Hookway *v.* Alfred Isaacs 114
Horabin *v.* B.O.A.C. 231, 232
Horn *v.* Minister of Food 114
Houghton *v.* Trafalgar Insurance 115
Houston *v.* Burns 48
Hudson *v.* Buck 25

I'm Alone Case 217
Ingham *v.* Emes 26
I.R.C. *v.* Baddeley 44, 47–50
I.R.C. *v.* Broadway Cottages Trust 53
I.R.C. *v.* City of Glasgow Police Athletic Association 44, 46
I.R.C. *v.* Dowdall, O'Mahoney 104

Jackson *v.* Rotax 117
James *v.* Smee 58, 59, 67, 70, 71, 73, 74
Joblin *v.* Watkins & Roseveare (Motors) 121
John Martin *v.* A. E. Taylor 123
Johnson *v.* Taylor Bros. 123
Jones, Re 53
Jones *v.* Richards 73
Jones *v.* Staveley Iron 8

Karflex *v.* Poole 117
Keighley Maxted and Bryan, Durant, Re 123
King, Re 42
Knotz *v.* Fairclough Dodd & Jones 126
Kuenigl *v.* Donnersmarck 33
Kwei Tek Chao *v.* British Traders & Shippers 127

Lake *v.* Simmons 115, 120
Lamb *v.* Attenborough 119
Land Settlement *v.* Carr 132
Lee *v.* Bayes 127, 128
Leicester *v.* Pearson 60, 61
L'Estrange *v.* Graucob 26, 113, 116
L'Evesque de Worcester's Case 128
Lindsay *v.* Cook 126
Liversidge *v.* Anderson 3
Londonderry Presbyterian Church *v.* I.R.C. 48
Lovelace *v.* D.P.P. 70, 74
Lowther *v.* Harris 119
Lyons *v.* De Pass 130

Maher *v.* G.N.R. 68
Manbre Saccharine *v.* Corn Products 125
Mariette, Re 43
Marner *v.* Banks 128
Massey *v.* Morris 71
Maynard *v.* Williams 39
McBoyle *v.* U.S. 106
Midland Bank *v.* Seymour 126
Mighell v. Sultan of Johore 3
Minister of Materials *v.* Steel Bros. 116
Mogul Steamship *v.* McGregor 142
Monk *v.* Whittenbury 119
Monkland *v.* Jack Barclay ... 5, 6
Morgan, Re 44, 50
Morice *v.* Bishop of Durham 41
Morrow *v.* M'Conville 39
Moses *v.* Macferlan 23
Mosul Case 260
Mousell Bros. *v.* L. & N.W. Rly. 62

National Bank of Egypt *v.* Hannevig's Bank 126
Niblett *v.* Confectioners Materials 117
Nicholson *v.* Smith Marriott 113
Nisbet *v.* Rayne and Burn ... 98
Nixon *v.* Att.-Gen. 5
Nokes *v.* Doncaster Collieries 111
Nordenfelt Case 6
Northern Steel *v.* John Batt ... 124
Nottage, Re 42

Nunan *v.* S.R. 225

O'Connor *v.* Hume 133, 135
Oppenheimer *v.* Attenborough 120, 121
Oppenheimer *v.* Frazer & Wyatt 120
Orient *v.* Brekke & Howlid ... 125
Orman Bros. *v.* Greenbaum ... 138
Oxford Group *v.* I.R.C. 40

Paget Publications *v.* Watson 82
Park, Re 53
Parke Davis *v.* Comptroller-General of Patents 233
Patten, Re 42
Pauwels *v.* Sabena 223, 231
Pavia *v.* Thurmann-Nielson ... 126
Pearse *v.* Hart 39
Pearson *v.* Rose & Young 120, 121
Pekelis *v.* Transcontinental Airlines 232
Pelham's Materials *v.* Mercantile Commodities 126
Pemsel's Case 48
Phelon & Moore *v.* Keel ... 65, 66
Philippson *v.* Imperial Airways 221
Plasticmoda *v.* Davidsons (Manchester) 126
Poggioli Case 241
Point of Ayr Collieries *v.* Lloyd-George 3
Polpen Shipping *v.* Commercial Union Assurance 106
Portendick Claims Case 241
Preston *v.* Hunting Air Transport 224
Prince Augustus *v.* Att.-Gen. 97
Printing and Numerical Registering *v.* Sampson 116, 117
Provincial Insurance *v.* Morgan 115
Pyrene *v.* Scindia Navigation 233

Quality Dairies (York) *v.* Pedley 67

Radio Communication in Canada, Re 105
Rayner *v.* Hambro's Bank 125
R. *v.* Curl 78
R. *v.* Handley 71
R. *v.* Hicklin 79, 80, 82, 83, 84, 85, 86, 88
R. *v.* Hutchinson 86
R. *v.* Martin Secker Warburg 82–86, 93
R. *v.* O'Donoghue 106
R. *v.* Pearson (No. 2) 68
R. *v.* Read 78
R. *v.* Reiter 82, 85
R. *v.* Shipley 186
R. *v.* Wilkes 78
Reynolds *v.* G. H. Austin 69, 73, 74
Rights of U.S. Nationals in Morocco 222
Ritts *v.* American Overseas Airlines 232
Roberts *v.* Woodward 68
Roe *v.* Naylor 113
Roper *v.* Taylor's 72
Rowland *v.* Divall 117
Royal Choral Society *v.* I.R.C. 45
Ruben *v.* Faire Bros. 127

Sadashiv Nayaran *v.* King Emperor 203
Salomon *v.* Salomon 104
Scrace *v.* Windrot 137
Sharkey *v.* Wernher 43
Sharpe *v.* Nosawa 123
Shaw, Re 44
Shields *v.* Honeywill & Stein 117
Simon *v.* Hedegaard 114
Sinason-Teicher *v.* Oilcakes Trading 126
Small *v.* Warr 68
Smeaton Hanscomb *v.* Sassoon I. Setty 116
Smith, Re 39
Southey *v.* Sherwood 78
Spanish Zone of Morocco Claims 254
Spencer Trading *v.* Devon 118
Staffs Motor Guarantee *v.* British Waggon 120
Standard Oil Co. *v.* U.S. 150
Stock *v.* Inglis 124
Strakosch, Re 49
Strutt *v.* Clift 64, 65, 66
Sumner Permain *v.* Webb 117
Sussex Peerage Case 96

Tatham *v.* Huxtable 53
Taylor *v.* Goodwin 105
Thackrah, Re 40
Thompson, Re 41, 42
Thomson *v.* Chain Libraries 82
Thorne *v.* M.T.A. 142
Tiberghien Draperie *v.* Greenberg 123
Tilak Case 203
Toucan Case 241
Trail Smelter Case 218, 220
Trans-Trust *v.* Danubian Trading 126
Trim Joint District Board *v.* Kelly 98
Tulk *v.* Moxhay 55

Ulen *v.* American Airlines 232
Ulysses Case 81, 83, 84
Underwood *v.* Barker 6
United Baltic *v.* Burgett & Newsam 123
Upsons *v.* E. Robins 139
U.S. *v.* Howell Electric Motors 104

Vandenburg *v.* French Sardine 223
Vantol *v.* Fairclough Dodd & Jones 114
Verge *v.* Somerville 49
Vermilya-Brown *v.* Connell ... 102
Veuve Gallais *v.* Société X ... 231
Vigers Bros. *v.* Sanderson Bros. 116
Vinall *v.* Howard 58
Volkswagen Case 35–37

Walls *v.* Centaur 113
Warman *v.* Southern Counties Car Finance 117
Webster *v.* Higgin 114
Weiner *v.* Harris 119
Weis *v.* Produce Brokers 123
Well of Loneliness Case 82
Westminster Bank *v.* Banca Nazionale 126
Westminster Bank *v.* Imperial Airways 225
Wheeler *v.* Mercer 138
Wilkes *v.* Goodwin 98
William Jacks *v.* Palmer's Shipbuilding 113
Williams' Trustees *v.* I.R.C. 46, 48
Wilson *v.* Murphy 68
Wilson *v.* Rickett Cockerell 117, 118
Wilsons' *v.* English 9, 13
Wimble Sons *v.* Rosenberg 124, 125
Wood, Re 41

TABLE OF STATUTES

1215	Magna Carta (16 John)	141
1601	Statute of Charitable Uses (43 Eliz., c. 4)	43
1623	Statute of Monopolies (21 Jac. 1, c. 3)	141
1677	Statute of Frauds (29 Car. 2, c. 3)	11
1707	Act of Union (6 Anne, c. 40)	178
1824	Vagrancy Act (5 Geo. 4, c. 83)	79
1828	Night Poaching Act (9 Geo. 4, c. 69)	107
1831	Truck Act (1 & 2 Will. 4, c. 37)	9
1842	Factors Act (5 & 6 Vict., c. 39)	118, 119
1843	Theatres Act (6 & 7 Vict., c. 68)	64
1857	Obscene Publications Act (20 & 21 Vict., c. 83)	75, 76, 79, 80, 82
1859	Recreation Grounds Act (22 Vict., c. 27)	50
1876	Customs Consolidation Act (39 & 40 Vict., c. 36)	107
1880	Employers' Liability Act (43 & 44 Vict., c. 42)	9
1881	Newspaper Libel and Registration Act (44 & 45 Vict., c. 24)	194
1888	Mortmain and Charitable Uses Act (51 & 52 Vict., c. 42)	48, 50
1889	Factors Act (52 & 53 Vict., c. 45)	113, 118–122
1891	Stamp Act (54 & 55 Vict., c. 39)	47
1893	Sale of Goods Act (56 & 57 Vict., c. 71)	13, 113–131
1906	Open Spaces Act (6 Edw. 7, c. 25)	50
	Marine Insurance Act (6 Edw. 7, c. 41)	13
	Workmen's Compensation Act (6 Edw. 7, c. 58)	9, 107, 108
1908	Statute Law Revision Act (8 Edw. 7, c. 49)	113
	Small Holdings and Allotments Act (8 Edw. 7, c. 36)	132
1915	Increase of Rent and Mortgage Interest (Restrictions) Act (10 & 11 Geo. 5, c. 17)	10, 132
1916	Larceny Act (6 & 7 Geo. 5, c. 50)	107
1919	Aeronautical Act (Canada)	212
1920	Increase of Rent and Mortgage Interest (Restrictions) Act (10 & 11 Geo. 5, c. 17)	10, 133
	Air Navigation Act (10 & 11 Geo. 5, c. 80)	213
1921	Finance Act (11 & 12 Geo. 5, c. 32)	46
	Education Act (11 & 12 Geo. 5, c. 51)	51
1922	Infanticide Act (12 & 13 Geo. 5, c. 18)	106
	Allotments Act (12 & 13 Geo. 5, c. 51)	132
1923	Agricultural Holdings Act (13 & 14 Geo. 5, c. 9)	132
1924	Carriage of Goods by Sea Act (14 Geo. 5, c. 22)	10
	Aerial Navigation Law (France)	212
1925	Law of Property Act (15 Geo. 5, c. 20)	54, 132
1926	Act to Regulate Competition (Norway)	154
1927	Moneylenders Act (17 & 18 Geo. 5, c. 21)	132
	Landlord and Tenant Act (17 & 18 Geo. 5, c. 36)	10
1932	Carriage by Air Act (22 & 23 Geo. 5, c. 36)	221, 222, 227
1934	Betting and Lotteries Act (24 & 25 Geo. 5, c. 58)	39
1936	Housing Act (26 Geo. 5, & 1 Edw. 8, c. 51)	132
	Public Order Act (1 Edw. 8, & 1 Geo. 6, c. 6)	107
1937	Physical Training and Recreation Act (1 Edw. 8, & 1 Geo. 6, c. 46)	50
	Factories Act (1 Edw. 8, & 1 Geo. 6, c. 67)	9, 13
	Act concerning Price Agreements No. 158 (Denmark)	154
1938	Leasehold Property (Repairs) Act (1 & 2 Geo. 6, c. 34)	132
	Infanticide Act (1 & 2 Geo. 6, c. 36)	106
	Hire Purchase Act (1 & 2 Geo. 6, c. 53)	117

1943 Law Reform (Frustrated Contracts) Act (6 & 7 Geo. 6, c. 40) ... 34
1944 Education Act (7 & 8 Geo. 6, c. 31) 51
1945 Family Allowances Act (8 & 9 Geo. 6, c. 41) 110
1946 No. 448 of June 29 (Sweden) 153
1948 Companies Act (11 & 12 Geo. 6, c. 38) 52
Agricultural Holdings Act (11 & 12 Geo. 6, c. 63) 10, 132
Monopolies and Restrictive Practices Act (11 & 12 Geo. 6, c. 66) 143
Press (Objectionable Matter) Act (India) 196
1949 Civil Aviation Act (12, 13 & 14 Geo. 6, c. 67) 231
Vehicles (Excise) Act (12, 13 & 14 Geo. 6, c. 89) 65
Civil Aviation Aeronautical Law (Dominican Republic) 212
Civil Aviation Law (Guatemala) 212
1951 Leasehold Property (Temporary Provisions) Act (14 & 15 Geo. 6, c. 38) 133
Cartels Act, July 4, 1951 (Austria) 153
1953 Monopolies and Restrictive Practices Commission Act (1 & 2 Eliz. 2, c. 51) 143
Prevention of Crime Act (1 & 2 Eliz. 2, c. 14) 107
1954 Landlord and Tenant Act (2 & 3 Eliz. 2, c. 56) 132–140
1955 Children and Young Persons (Harmful Publications) Act (3 & 4 Eliz. 2, c. 12) 88
Registration of Books (Amendment) Act (India) 194

TABLE OF TREATIES

1814	Peace Treaty of Paris	161
1919	Paris Convention *	209, 210–211, 212, 213
1924	Brussels Convention	227
	Havana (Sanitary) Convention	212
1926	Madrid Convention *	209, 213
1928	Berne Conventions	229
	Havana Convention *	209, 213
1929	Warsaw Convention *	208, 220–234
1944	Chicago Convention *	208–209, 210–211, 212, 213, 215, 218
1945	World Court Statute	236–237, 238–239, 259
1948	Geneva Convention on Rights in Aircraft	221
1952	Rome Convention on Surface Damage	221, 227, 230, 232
1955	Hague Protocol *	208, 220–234

* Conventions on Air Law.

INDEX

Absolute prohibition, 58–61, 67
Adhesion, contracts of, 27
Administrative law, creation of, 15
Air carrier's liability, 220–234
  limits, 228–234
  principle, 227–228
Aircraft
  definition, 211–212, 218, 219
Air law, 208–234
Airspace
  artificial satellites, 217–220
  definition, 210–213
  legal status, 215–217
  limits, 213–215
  sovereignty, 208–210
Alvarez, Judge, 251
American Restatement on Trusts, 51
Artificial satellites
  space travel and, 217, 220
Assumpsit, 22–23

Balloons, 218–219, 220
Barry, Sir Gerald, 89
Bona fides, 19–21
Boni est ampliare jurisdictionem, 2, 5
Bürgerliches Gesetzbuch
  section 157, 31
  section 242, 31–32

Canon law, 21–22
Carriage, documents, of, 223–226
Causa, 21
Charitable trusts
  advantages, 52
  definition, 50
  Nathan Committee, 51
Cheng, B., 208–234
C.I.F. Contracts, 122, 123
Clear and Present Danger Rule, 93
Code Civil, 30–31
Cohn, E. J., 34, 35
Coing, H., 21
Coke, Sir Edward, 7, 129
Common law
  advantages and disadvantages, 12–13
  functions, 13
  inadequacy, 14
  Public policy and the Executive, 1–15
  recession of influence, 1–11
  sources, 15
Commonwealth, freedom of press in, 184–207
Conseil d'État, 1
Construction
  contra proferentem rule, 10
  doctrine of frustration, 10
  principle of strict, 7, 57
Contracts
  good faith in, 16–38
Cooper, J. C., 211, 216

Danckelmann, B., 35
Declaration to condemn Executive, 5
Demonstratio, 20
Denning, Lord Justice, 27
Derech eretz, 38
Despotism, new, 2
Devlin, Sir Patrick, 1–15

Ecclesiastical courts, 22
Employment, common, 9
Ernst, M., 84, 93, 94
Evershed, Lord, 13, 111
Executive and common law and public policy, 1–15
Ex facto jus oritur, 242
Ex fide bona, 20
Ex injuria jus non oritur, 242

Factors Act, 113, 118–122
Fifoot, C. H. S., 21
FitzGerald, R. C., 160–183
F.O.B. contracts, 122
Formula
  ex fide bona, 20
Frank, Judge, 108, 109
Fraud by silence, 31

Gernet, L., 19
Gifts in favour of sport, 39–56
  existing clubs, 39
  formation of company, 52
  long lease, 53
  maintenance of tombs, 41
  power of appointment, 53
  restrictive covenant, 54–56
  sporting purposes also charitable, 43–52
  sporting purposes less than perpetuity, 41–43
Gloag, W. M., 28
Goodhart, A. L., 27
Gray, 101

Hackworth, Judge, 245
Hague Protocol (1955), 220–224

Hamson, C.J., 1
Hayden Planetarium Symposium, 211
Helmstadt, Professor of, 239
Hemingway, E., 87
Herbert, Sir Alan, 75, 89
Hewart, L.C.J., 2
High altitude flight, 208
Hightrees Case, 24, 26
Holland, D. C., 184–207
Holmes, Justice, 93, 104
Hume, D., 100
Hunter, W. A., 16
Hyde, C. C., 245

Injunction, to restrain arbitration proceedings, 5
International carriage, 221–223
International law
  analytical tasks, 240–250
  deductive method, 243–244
  digests, 245
  doctrine of, 235–265
  history, 247, 252, 257
  inductive analysis, new tasks, 244–250
  inductive mimicry, 240–243
  inductive treatment of principles, 243–244
  inter-disciplinary studies, 250–259
  law-creating agencies, 237–238, 249–250
  law creating process, 236–237, 243, 249
  law-determining agencies, 237–238, 249–250
  legal planning, 260–262
  legislation, science of, 260–261, 263–264
  planning, problems of, 262–264
  politics and, 243, 262
  res judicata, 238
  sociology, 252, 253–256, 257, 258, 260–261
  sources, 236
  synopsis, 250–259
International sales, 122–127
Inter pacem ac bellum nihil est medium, 251
Interplanetary flight, 208
Interpretation of statutes, 6, 63, 96–112
  golden rule, 97
Ivamy, E. R. H., 113–131

Jackson, Justice, 103
Johnson, S., 86
Jolowicz, H. F., 16, 17
Judicial dictionary of criminal law, 68

Kenyatta, J., 197
Kinsey Reports, 77
Korah, Valentine Latham, 141–159

Laches, 32
Legis actiones, 19
Legislative intention, 96–112
Lennox-Boyd, A., 181
Lloyd, D., 75–95
Locke, J., 99–100
Lopez, Mons., 181, 186, 207

Magna Carta, 141
Malta
  constitutional changes, 165–169
  constitutional future, 160–183
  Dominion status, 169–174
  economic development, 162
  Round Table Conference, 160
Mansfield, Lord, 186
Market overt, 127–131
Marshall, O. R., 39–56
Master and servant, 9
Mens rea and vicarious responsibility, 57–74
Mercantile agent, 120–121
Mintoff, D., 160, 162, 170, 175
Misleading cases, 75
Monopolies
  at common law, 141–143
  Commission, 141, 143–148
  control, 141–159
  foreign registration, 153–155
  foreign tribunals, 155–159
  proof of pernicious, 6
  Statute of, 141
Moore, J. B., 245
Murison, A. F., 16

Nathan Committee on Charitable Trusts, 51
Negligence as *mens rea*, 60, 61
Nulla poena sine lege, 57

Obscenity, and the law, 75–95
  Bill to repeal present law, 89
  development of law, 78
  publication, definition of, 79, 80
  recent developments, 83–88
  suggestions for reform, 88–95
Olivier, B., 160, 169, 171
Outer space
  legal status, 215–217

Parliament
  control of Executive, 14
  increasing activity, 12
  supremacy, 7, 12
Payne, D. J., 96–112
Permitting or causing, criminal responsibility, 70–74

Pickles, W., 17
Planiol, 30, 103
Point of Ayr, principle, 4
Powell, R., 16–38
Privilege, government, 4
Prerogative, 3
Presumption of *mens rea*, 60
Press
  executive power to suppress, 196–202
  freedom of, in Commonwealth, 184–207
  licensing control over, 187–192
  miscellaneous laws affecting, 204–206
  registration requirements, 193–196
  seizure and suppression of, 200–203
Pringsheim, F., 19
Public licence and vicarious responsibility, 60
Public policy, 1–15
  heads, 5, 6
  meanings, 6, 8

Recognition of status, 3
Recorder, The, 90–91
Redgrave, 13
Restrictive practices, 141–159
Robertson, E., 16
Roman law
  comparative teaching, 17
Rosebery, Lord, 175

Sale of Goods Act, revision, 113–131
  exclusion of statutory conditions, 113–118
  incorporation of Factors Act, 118–122
  market overt sales, 127–131
Salus populi suprema lex, 5
Scamell, E. H., 55, 132–140
Schachter, O., 211
Schwarzenberger, G., 235–265
Secretary of State
  Certificate of, 2–3
Security of tenure, 132–140
Separation of powers, 104
Smith, H. A., 245
Sohm, R., 19
Sovereignty, 258
  airspace, 208–220
Space travel, 217–220
Spondeo, 17
Status, 2
Star Chamber procedure, 147–148
Statutes
  interpretation of, 6, 96–112
Strict responsibility, 57–61
Suppression of Vice, Society for, 78

Tenure
  Security of, under Landlord and Tenant Act, 1954, 132–140
  Part I, 135–138
  Part II, 138–140
Trade
  Restraint of, 6
  Restrictive Practices, 141–159
  Restrictive Practices Bill, 148–153
  Restrictive Practices Court, 149–150
Travaux préparatoires, 103

Uberrimei fidei, 25
Undue influence, 10
Unwin, Sir Stanley, 83

Venire contra factum proprium, 33
Verba chartarum fortius accipiuntur contra proferentes, 115
Verwirkung, doctrine of, 32
Vicarious responsibility in criminal law, 61–70
Visscher, C. de, 253, 254
Volkswagen Case, 35–37
Vollenhoven, C. van, 235
Voluntas civitatis maximae est servanda, 251

Warsaw Convention (1929) 220–234
  documents of carriage, 223
  Hague Protocol, 220–221
  scope, 221–223
Webber, G. J., 1
Wilde, O., 70
Wilful blindness, 72, 73
Williams, G. L., 57–74
Woolsey, Judge, 83, 84, 86
World Court, 236, 238, 243, 260, 262

UL . 8 APR 1973

1976 — 11

1977 - 11

1978 - /

1979 - ##

1983 - 1

1984 + 1

1985 1